Journal of Air Law and Commerce

Volume 77 | Issue 2 Article 2

2012

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The authors would like to thank Steve Almaguer, Kate Barry, Anntim Vulchev, Michael Korns, and Jana Volante, who all provided invaluable assistance in preparing this article. The authors were counsel to Teledyne Continental Motors, Inc., a party in the *Yellen* and *Crouch* cases discussed in this article.

INTRODUCTION

THIS ARTICLE SUMMARIZES decisions and developments in the field of aviation law from the year 2011. Rather than trying to cover every possible development, it focuses on those with the most potential significance. Its coverage ends as of December 31, 2011. Some decisions from early 2011, however, were covered by the previous edition of this article and are therefore excluded from this piece. The division of the discussion below into substantive categories of law is done as a matter of convenience based loosely on the more prominent features of a particular case; obviously a case may involve more than one area of law.

I. FORUM NON CONVENIENS

In *Anyango v. Rolls-Royce Corp.*, the court affirmed a dismissal on grounds of forum non conveniens.[1] The lawsuit arose out of a helicopter accident in 2008 in Cranbrook, British Columbia.[2] On a flight to visually inspect power lines, "the helicopter lost power and crashed to the ground," killing a Kenyan student as he was on his way to mail a letter to his parents in Kenya.[3] The parents filed a wrongful-death suit in Indiana, where the helicopter's engine had been manufactured in 1973 by a corporate predecessor of Rolls-Royce.[4] Certain engine components had been designed in Indiana at a Honeywell International, Inc. facility and manufactured in North Carolina.[5] Bell Helicopter Textron, Inc. manufactured the helicopter in Texas; at the time of the suit, all the records related to the helicopter's design and certification were in Quebec, Canada.[6]

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[1] 953 N.E.2d 1147, 1152 (Ind. Ct. App. 2011).
[2] *Id.* at 1149.
[3] *Id.* at 1150.
[4] *Id.* at 1149–50.
[5] *Id.* at 1149.
[6] *Id.* at 1149–50.

The defendants moved to dismiss on forum non conveniens grounds, arguing that British Columbia was a more suitable venue "because the accident and accident investigation occurred there, all physical evidence and witnesses [were] located there, and a similar lawsuit filed by the pilot's and passengers' estates [was] pending there as well."[7] The plaintiffs opposed the motion, arguing that in Canada "only nominal substantive damages would be available to them," as opposed to Indiana, where, they asserted, their case would have a "significant seven figure value."[8] The trial court dismissed the case, and the plaintiffs appealed.[9]

On appeal, the plaintiffs argued that the dismissal was error because British Columbia provided "no economically adequate remedy," while the defendants countered that, even if the case were to remain in Indiana, British Columbia substantive law would apply regardless.[10] The appellate court affirmed the dismissal, holding that under the choice-of-law rules of Indiana, the *lex loci delicti* principle would indeed require the application of British Columbia law.[11] Even aside from that issue, the appellate court determined that the trial court did not act unreasonably in dismissing the case: a British Columbia court would be an adequate alternative forum, and the balance of private factors (e.g., ease of access to sources of proof) and public factors (e.g., local interest in having localized disputes decided at home and unfairness of burdening citizens in an unrelated forum with jury duty) favored a trial in British Columbia.[12]

In *Tazoe v. Airbus S.A.S.*,[13] the Eleventh Circuit found that the district court generally did not abuse its discretion when it dismissed, on forum non conveniens grounds, wrongful-death claims arising from the worst aviation disaster in Brazilian history.[14] On July 17, 2007, TAM Linhas Aéreas Flight 3054 overran a runway while landing in São Paulo, Brazil, crashing and killing all 187 people on board the Airbus A320-233, as well as twelve on the ground.[15] One of the deceased, Roberto Tazoe,

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[7] *Id.* at 1150.

[8] *Id.*

[9] *Id.* at 1151.

[10] *Id.* (internal quotation marks omitted).

[11] *Id.*

[12] *See id.* at 1152–53.

[13] 631 F.3d 1321 (11th Cir. 2011).

[14] *Id.* at 1328.

[15] *Id.*

was a U.S. citizen, while the remainder of the deceased were citizens or residents of Brazil.[16] The plaintiffs, family members of the deceased, filed actions in the Southern District of Florida against the airline, the aircraft leasing company, and the manufacturers of the Airbus.[17] The manufacturers, in turn, moved to dismiss on forum non conveniens grounds.[18] In analyzing the district court's decision to dismiss, the court of appeals separated the plaintiffs into three categories: (1) Brazilian family members, (2) the family of Roberto Tazoe, and (3) Anna Finzsch, a Brazilian whose complaint was dismissed sua sponte before service.[19] Although the Eleventh Circuit affirmed dismissal of the complaints of the Brazilian family members and the family of Roberto Tazoe, it reversed the district court's sua sponte dismissal of Finzsch's complaint because the court did not first afford her notice or an opportunity to be heard.[20]

Under the law of the Eleventh Circuit, "[t]he manufacturers had to establish that (1) an adequate alternative forum [was] available, (2) the public and private factors weigh[ed] in favor of dismissal, and (3) the plaintiff [could] reinstate his suit in the alternative forum without undue inconvenience or prejudice."[21]

The court of appeals first determined that Brazil was both an "adequate" and "available" forum.[22] The court noted that the manufacturers, in obtaining dismissal in the district court, consented to accepting service of process in Brazil, tolling of any statutes of limitations, making witnesses and documents available in Brazil, and respecting any final judgment of a Brazilian court.[23] The court also noted that other federal courts had determined that the Brazilian legal system provided adequate remedies.[24]

The court then turned to an analysis of the public and private factors.[25] In analyzing the private factors, the court determined that "[t]he record support[ed] the determination that Brazil offer[ed] superior access to sources of proof," in that the flight wreckage was in Brazil (including the cockpit voice recorder

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16 *Id.*
17 *Id.* at 1329.
18 *Id.*
19 *Id.* at 1328.
20 *Id.* at 1335–37.
21 *Id.* at 1330 (internal quotation marks omitted).
22 *Id.*
23 *Id.*
24 *Id.* at 1330–31.
25 *Id.* at 1331.

and digital flight data recorder) and because several government investigations of the accident had also taken place in Brazil.[26] The court also found it significant that the Southern District of Florida lacked authority to compel the attendance of Brazilian witnesses.[27] Finally, the court noted that the manufacturers intended to implead Brazilian third parties but could not do so in the Southern District of Florida.[28]

In analyzing the public factors, the Eleventh Circuit noted that "[t]he record support[ed] the determination that the family members' complaints [would] overburden the courts of the United States."[29] The court further determined that Brazil had a superior interest in resolution of the claims: "The accident that is the subject of this litigation killed nearly 200 citizens or residents of Brazil and was the worst accident in Brazilian aviation history. Indeed, all but one of the victims were citizens of Brazil. The interest of Brazil in resolving these claims is paramount."[30] Lastly, "[t]he need to apply foreign law . . . also favor[ed] dismissal."[31]

Turning to the third and last factor of the forum non conveniens analysis, the Eleventh Circuit found that the manufacturers' stipulations regarding service of process, discovery, and tolling of the applicable statutes of limitations were dispositive.[32]

Finally, the court noted that the claims of Roberto Tazoe's family were due "'somewhat more deference,' as [the court was] hesitant to deny citizens access to courts of the United States."[33] However,

> [t]he district court did not abuse its discretion when it concluded that material injustice [was] manifest with respect to the claims of Tazoe's family members against the manufacturers. The district court concluded that the "[m]anufacturing [d]efendants' inability to compel third-party witnesses or the production of documents from those witnesses, and the inability to implead potentially liable third-parties, [was] both unusually extreme and materially unjust."[34]

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[26] *Id.* (internal quotation marks omitted).
[27] *Id.* at 1331–32.
[28] *Id.* at 1332.
[29] *Id.* at 1333.
[30] *Id.* at 1334.
[31] *Id.*
[32] *Id.* at 1334–35.
[33] *Id.* at 1335 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981)).
[34] *Id.*

The Eleventh Circuit thus affirmed dismissal of those claims as well.[35]

In *Bakeer v. Nippon Cargo Airlines, Co.*,[36] a report and recommendation by a magistrate judge of the Eastern District of New York that was later adopted by the district judge, the court denied the defendant airline and staffing agencies' motion to dismiss for forum non conveniens.[37] The defendant, Nippon Cargo Airlines (NCA), and its staffing providers faced claims of employment discrimination based on race, national origin, age, citizenship, and alienage brought by three flight engineers and the widow of a fourth.[38] All four flight engineers (also known as second officers) were Caucasian and were hired to fly Boeing B747-200 airplanes (Classics) "on cargo routes in the United States and to Japan."[39] The flight engineers, none of whom were residents of New York, were terminated from their positions when NCA retired its Classics fleet and completed the switchover to 747-400s, which could be flown without flight engineers.[40] The lawsuit followed, and defendants moved the court for an order of dismissal on forum non conveniens grounds,

> contending that plaintiffs [had] no connection to the Eastern District of New York, that Japan, the alternative forum selected by defendants, provid[ed] an adequate and suitable forum for adjudicating plaintiffs' claims, and that the balance of public and private interests support[ed] the choice of Japan as the appropriate forum for [that] case.[41]

The district court applied the Second Circuit's three-step test in adjudicating motions to dismiss based on forum non conveniens: first, determining "the degree of deference properly accorded the plaintiff's choice of forum"; second, considering whether the "alternative forum proposed by the defendants [was] adequate to adjudicate the parties' dispute"; and finally,

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[35] *Id.*

[36] Nos. 09 CV 3374, 3375, 3377, 3378 (RRM), 2011 WL 3625103 (E.D.N.Y. July 25, 2011) (Mag. J. Rep. & Rec.), *aff'd*, No. 09-CV-3374 (RRM)(CLP), 2011 WL 3625083 (E.D.N.Y. Aug. 12, 2011); *aff'd sub nom.* Michaud v. Nippon Cargo Airlines, Co., No. 09-CV-3375 (RRM)(CLP), 2011 WL 5402642 (E.D.N.Y. Nov. 7, 2011); *aff'd sub nom.* Frith v. Nippon Cargo Airlines, Co., No. 09-CV-3378 (RRM)(CLP), 2011 WL 5429642 (E.D.N.Y. Nov. 7, 2011).

[37] *Bakeer*, 2011 WL 3625103, at *5.

[38] *Id.* at *1.

[39] *Id.*

[40] *Id.* at *4.

[41] *Id.* at *5 (footnote omitted).

"balanc[ing] the private and public interests implicated in the choice of forum."[42]

The first prong of the test favored the plaintiffs.[43] The defendants argued that the plaintiffs were "foreign plaintiffs" in that none of them ever resided in New York.[44] However, the court noted that "when the choice of forum is between one in the United States and one in a foreign country, a United States citizen's choice of forum in this country is entitled to significant deference, 'as [the court is] hesitant to deny citizens access to courts of the United States.'"[45] A New York choice-of-law provision in the employment contracts of three of the plaintiffs, while not a forum selection clause, favored showing deference to their choice of forum.[46] And while the flight engineers did not reside in New York, it was "the place where they began and ended their work assignments, [and] received their assignments, orders, equipment, cargo, and other crew members."[47] Finally, the defendants did "not show[ ], or even allege[ ], that [the] plaintiffs [had] any greater connection to Japan than they [did] to New York."[48]

In regard to the second prong, the defendants were amenable to service of process in Japan, willing to toll any statutes of limitations, and willing to make witnesses available there as well.[49] But while Japanese discovery procedures "might be considered sufficient," on the other hand, "[i]n light of the fact that age and disability discrimination are not explicitly prohibited by Japanese law, and given the absence of a single Japanese decision cited that deals with employment discrimination claims," the court reasoned that "even if Japan [was] an adequate alternative forum, other factors, including the choice of law provisions," spoke in favor of retaining the action.[50]

Finally, in applying the third factor, the court found that "the private and public interests, including the convenience of witnesses and parties, familiarity of the courts with the legal issues,

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[42] *Id.* at *6 (quoting Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005)).

[43] *Id.*

[44] *Id.* at *8 (internal quotation marks omitted).

[45] *Id.* at *10 (quoting Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1335 (11th Cir. 2011)).

[46] *Id.* at *10–11.

[47] *Id.* at *12.

[48] *Id.*

[49] *Id.*

[50] *Id.* at *15.

and the impact on the community all favor[ed] litigation in New York."[51]

In *In re Air Crash at Madrid, Spain, on August 20, 2008*,[52] an action arising out of the crash of a Spanair McDonnell Douglas MD-82 jetliner during takeoff in Madrid that killed 154 and injured eighteen, the Central District of California granted defendant airplane manufacturers' motions to dismiss on forum non conveniens grounds.[53]

More than 200 plaintiffs, who were mostly citizens of Spain, and none of whom were United States citizens, brought wrongful-death and personal-injury suits, asserting negligence and strict products liability against the airplane manufacturer, its successor, and alleged component manufacturers.[54]

In ruling on the manufacturers' motion to dismiss, the court noted that the party moving for dismissal on forum non conveniens grounds must show (1) "an adequate alternative forum" and (2) "that the balance of private and public interest factors favors dismissal."[55] For the first prong, generally, a defendant can prove an "adequate alternative forum" by demonstrating that it is "'amenable to process' in another jurisdiction" and that the forum would also provide the plaintiff with a "sufficient remedy for his wrong."[56] The defendants showed they were amenable to process by agreeing that, as a condition of dismissal, they would submit themselves to the appropriate Spanish court.[57] The plaintiffs argued that, despite the fact that Spanish courts recognize and allow recovery for negligence and strict-liability claims, Spain would not provide an "adequate alternative forum" because (1) their civil claims would be indefinitely delayed until criminal proceedings against two mechanics involved in the crash were resolved and (2) the plaintiffs seeking compensation through the criminal proceedings would not be able to pursue claims against the manufacturing defendants.[58]

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[51] *Id.* at *21.

[52] No. 2:10-ML-02135 GAF, MDL 2135, 2011 WL 1058452 (C.D. Cal. Mar. 22, 2011), *amended on reconsideration in part*, No. 2:10-ML-02135 GAF (RZx), 2011 WL 2183972 (C.D. Cal. May 16, 2011).

[53] *Id.* at *1.

[54] *Id.*

[55] *Id.* at *3 (quoting Cariajano v. Occidental Petroleum Corp., 626 F.3d 1137, 1145 (9th Cir. 2010)).

[56] *Id.* at *4 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981)).

[57] *Id.*

[58] *Id.*

In response, the court stated, first, that the possible delay did not make the Spanish courts an inadequate forum, as complex litigation of this kind could take just as long in the U.S. courts.[59] Second, the court stated that the Spanish forum was not inadequate simply because it would allow the plaintiffs to be compensated for their losses only once.[60] Moreover, the court noted that if the defendant mechanics were found guilty, the mechanics would likely sue their employer, who would then sue other joint tortfeasors, thus providing more chances of recovery for the plaintiffs.[61]

In addressing the second requirement—a showing that private and public interest factors warrant dismissal—the court held that defendants must show

> facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to [the] plaintiff's convenience, which may be shown to be slight or nonexistent or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.[62]

To weigh the private interest factors, the court examined:

> (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses [could] be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make the trial of a case easy, expeditious and inexpensive.[63]

The court concluded that the availability of witnesses and the cost of witness attendance "slightly favor[ed] dismissal."[64]

In analyzing these factors, the court noted that, while one side would have difficulty in presenting witnesses no matter which forum would hear the case, the comparative cost for bringing the witnesses to trial would be greater if the case were tried in the United States since over 200 plaintiffs were foreign citizens.[65] The court also noted that the alternative forum was

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[59] *Id.* at *6.

[60] *Id.*

[61] *Id.*

[62] *Id.* at *7 (quoting Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).

[63] *Id.*

[64] *Id.* at *10.

[65] *Id.*

closer to the plaintiffs, and that, while the plaintiffs argued that no single Spanish court would have jurisdiction over all the parties that the defendants claimed should be included, such would also be the case in the United States.[66] Also, while it would be more "complicated" and costly to translate U.S.-based technical data into Spanish, it would, by comparison, "lose far more in translation" the other way.[67] The "enforceability of the judgment factor" was "neutral," however, since the defendants would adhere to the judgment in either forum.[68] Next, the court was not convinced that the plaintiffs faced significant "financial impediments" in the Spanish forum because the plaintiffs might be liable for the defendants' attorney fees in the Spanish forum and did not have access to contingency fees in the Spanish forum as well.[69] It reasoned that "[b]ecause the United States stands almost alone in requiring each side to bear its own attorneys' fees, finding the possibility of fee-shifting in a foreign forum to weigh significantly against dismissal would risk gutting the doctrine of forum non conveniens entirely."[70] However, the court found the defendants' inability to implead Spanair in the United States to be a significant factor for dismissal.[71]

The court then weighed the public interest factors, which included "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum."[72] The court concluded that the local interest was far greater in Spain than the United States,[73] and that if the case were to be tried in the U.S. courts, it would likely center on interpretations of Spanish law.[74] Because the local interest in the lawsuit was attenuated in the United States, there was no justification for the enormous expenditures in time and money of trying the actions in the United States.[75] The court concluded that the suits should thus be dismissed on forum non conveniens grounds.[76]

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66 *Id.*
67 *Id.* at *11–12.
68 *Id.* at *12.
69 *Id.*
70 *Id.* (internal quotation marks omitted).
71 *Id.* at *14.
72 *Id.*
73 *Id.* at *14–15.
74 *Id.* at *16–17.
75 *Id.* at *18.
76 *Id.* at *19.

In *In re Air Crash Over the Mid-Atlantic on June 1, 2009,* the Northern District of California concluded for a second time that the United States was not the proper forum for suits arising out of the crash of Air France Flight 447 over the Atlantic.[77] The court had previously dismissed the claims arising out of the accident on forum non conveniens grounds in 2010.[78] The plaintiffs re-filed, omitting all French defendants, which in their view eliminated France as an alternate forum, since French courts would not have jurisdiction over a lawsuit involving non-French plaintiffs suing non-French defendants.[79] The defendants, American aircraft component part manufacturers, moved to dismiss the action, and the plaintiffs moved the court to reconsider its original dismissal.[80]

The court noted the applicable legal standard in the Ninth Circuit: "A party moving to dismiss based on forum non conveniens bears the burden of showing that (1) there is an adequate alternative forum, and (2) the balance of private and public interest factors favors dismissal."[81] However, the court's analysis centered on the rule that "[a] party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct."[82] The court found that this was exactly what the plaintiffs were doing in "re-filing suits that omit[ted] French [d]efendants they previously asserted were liable and still seem[ed] to allege [were] at least partially responsible."[83] The court expressly found this conduct, an attempt to defeat forum non conveniens dismissal, to be "impermissible."[84]

The court was not persuaded by the plaintiffs' argument that they "[were] free to frame their [c]omplaints as they wish[ed]"; that argument "ignore[d] entirely the fact that forum non conveniens is by its nature a doctrine that limits plaintiffs' choices."[85] The plaintiffs could not "render France unavailable through unilateral jurisdiction defeating pleading," where (1) the pleadings and "common sense" demonstrated that the

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[77] 792 F. Supp. 2d 1090, 1102–03 (N.D. Cal. 2011).

[78] *See In re* Air Crash Over the Mid-Atlantic on June 1, 2009, 760 F. Supp. 2d 832, 847–48 (N.D. Cal. 2010).

[79] *In re Air Crash Over the Mid-Atlantic,* 792 F. Supp. 2d at 1093.

[80] *Id.* at 1093–94.

[81] *Id.* at 1094.

[82] *Id.* (internal quotation marks omitted).

[83] *Id.*

[84] *Id.* at 1095.

[85] *Id.* at 1097.

French parties were proper defendants; (2) the "[p]laintiffs already sued French parties and dropped them only after a forum non conveniens dismissal"; and (3) there were no new developments that "plausibly provid[ed] a reason for why [the] [p]laintiffs removed the French [d]efendants, other than a desire to defeat the [c]ourt's original forum non conveniens [o]rder and render France an unavailable forum for the new actions."[86] The court granted the motion to dismiss and denied the motion for reconsideration.[87]

II. FEDERAL PREEMPTION OF STATE LAW

A. PREEMPTION UNDER THE FEDERAL AVIATION ACT

Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission began as a suit filed by a small airport in Connecticut seeking declaratory relief against municipal authorities.[88] The relief sought was permission to cut down trees on the airport property, which included protected wetlands.[89] The airport "[was] not licensed by the [Federal Aviation Administration (FAA)]; it [was] not federally funded, and no federal agency ha[d] approved or mandated the removal of the trees from its property."[90] The airport contended that the trees qualified as "obstructions to air navigation" under FAA regulations, and the airport's position was that federal law preempted any need for it to obtain permission from state authorities under state environmental law to remove the trees.[91] The federal government formally "disclaimed any authority to order the trees' removal."[92] After a bench trial, the district court found that while Congress intended to preempt the field of air safety, there was no federal interest in what the airport was proposing to do and hence no preemption, and the court found in the defendants' favor.[93]

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[86] *Id.*

[87] *Id.* As an alternative ground for dismissal, the court examined availability of the alternative forum anew and reached the same conclusion. *See id.* at 1097–1103.

[88] 634 F.3d 206, 208–09 (2d Cir. 2011).

[89] *Id.* at 208.

[90] *Id.* at 211.

[91] *Id.* at 208 (citing 14 C.F.R. § 77.23 (2010)).

[92] *Id.* at 211.

[93] *Id.* at 209.

On appeal, the Second Circuit affirmed.[94] The court of appeals declared: "Today we join our sister circuits" in "formally holding that Congress intended to occupy the field of air safety."[95] Nevertheless, the court determined that, on the facts of that case, air safety was not sufficiently at issue to trigger that preemption, since "the generally applicable state laws and regulations imposing permit requirements on land use challenged [there] [did] not, on the facts before [the court], invade that preempted field."[96] The court also rejected the argument that the Airline Deregulation Act of 1978, which has an express preemption provision, applied, since "the impact on air carriers of the laws and regulations at issue [there], if any, [was] too remote. . . ."[97]

In re Air Crash Near Clarence Center, New York, on February 12, 2009[98] involved plaintiffs seeking relief in Connecticut, Florida, New Jersey, New York, and Pennsylvania for wrongful deaths arising from the crash of Continental Connection Flight 3407, which occurred on February 12, 2009, while on final approach to the Buffalo Niagara International Airport.[99] The United States Judicial Panel on Multidistrict Litigation transferred all pending actions concerning Flight 3407 to the Western District of New York for pretrial proceedings pursuant to 28 U.S.C. § 1407.[100]

"Defendants Pinnacle Airlines Corp. and its wholly owned subsidiary, Colgan Air, Inc., argue[d] that federal standards of care appl[ied] to the plaintiffs' state-law negligence claims and that Virginia law govern[ed] punitive damages."[101] The "[p]laintiffs argue[d] that New York law govern[ed] both the standards of care and punitive damages."[102]

Judge William Skretny abided by the Second Circuit's ruling that Congress, through the Federal Aviation Act of 1958 and its

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94 *Id.* at 212.

95 *Id.* at 210 (citing U.S. Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010); Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007); Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6th Cir. 2005); Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367–68 (3d Cir. 1999); French v. Pan Am Express, Inc., 869 F.2d 1, 5 (1st Cir. 1989)).

96 *Id.* at 212.

97 *Id.*

98 798 F. Supp. 2d 481 (W.D.N.Y. 2011).

99 *Id.* at 483.

100 *Id.*

101 *Id.*

102 *Id.* at 484.

associated regulations, intended to preempt state regulations concerning air safety (including state standards of care).[103] In siding with the defendants, Judge Skretny found that applying state standards of care would interfere with specific safety standards found in Title 14 of the Code of Federal Regulations and "potentially subject airlines and related entities to [fifty] different standards."[104]

As for punitive damages, the plaintiffs asserted that New York law (which has no cap) was controlling while the defendants maintained that Virginia law (which caps punitive damages at $350,000) governed.[105] In weighing the choice-of-law rules of the states in which the actions were commenced, the court determined that the location of the tort and wrongful conduct were of critical significance.[106] Accordingly, the court found "no cause to depart from New York's general rule of applying *lex loci delicti* to choice-of-law questions involving conduct-regulating laws" (e.g., punitive damages).[107] In the court's ultimate view, "New York's interest 'in the admonitory effect that applying its law [would] have on similar conduct in the future' [was] of critical importance and outweigh[ed] Virginia's interest."[108]

Keum v. Virgin American Inc. arose as the result of an incident on a Virgin America flight from Seattle to San Francisco on May 27, 2010.[109] The plaintiff, Keum, who was sitting in coach class, attempted to use a lavatory in first class.[110] She alleged that a flight attendant yelled at her for the attempt, standing "so close while yelling that she could feel his saliva striking her face, forcing her to turn aside."[111] He then allegedly punched her shoulder, causing numbness.[112] Keum, of Korean descent, alleged

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[103] *Id.* at 486 (citing Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206, 212 (2d Cir. 2011); Aldana v. Air E. Airways, Inc., 477 F. Supp. 2d 489, 493 (D. Conn. 2007)).

[104] *Id.*

[105] *Id.*

[106] *Id.* at 489 (citing Deutsch v. Novartis Pharm. Corp., 723 F. Supp. 2d 521, 525 (E.D.N.Y. 2010) (finding that for a punitive damages issue, "the law of the jurisdiction where the conduct occurred should apply")).

[107] *Id.* at 492.

[108] *Id.* (quoting Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684–85 (N.Y. 1985)). The court found that two of the actions were governed by the Montreal or Warsaw Conventions, neither of which permits recovery of punitive damages. *Id.* at 494.

[109] 781 F. Supp. 2d 944, 947 (N.D. Cal. 2011).

[110] *Id.*

[111] *Id.*

[112] *Id.*

that, by contrast to her treatment, a Caucasian passenger in coach was allowed to use the first-class toilet without trouble.[113] Keum alleged a number of state-law torts, as well as federal and state discrimination claims.[114] Virgin America moved for judgment on the pleadings, arguing, among other things, that the Federal Aviation Act preempted the claims.[115]

The court rejected the preemption argument.[116] The court began its analysis by noting that FAA preemption occurs "in the fields of economic regulation of airlines and airline safety," and that the Code of Federal Regulations "clearly establish[es] a federal standard of care . . . but only as applied to 'aircraft operators.'"[117] Citing the leading Ninth Circuit cases on preemption, *Montalvo v. Spirit Airlines*[118] and *Martin ex rel. Heckman v. Midwest Express Holdings*,[119] the court found that they "stand for the proposition that while the state standard of care is preempted in the context of claims directly implicating airline safety, state laws and standards of duty apply to claims directed at matters not directly touching on airline safety or other fields with pervasive regulations."[120] The court held that Keum's claims, involving alleged mistreatment of a passenger by a flight attendant, "[did] not clearly implicate airline safety" and therefore were not preempted.[121] Of the plaintiff's seven causes of action, the court dismissed three for various infirmities while granting leave to amend and allowed the other four to stand.[122]

Pease v. Lycoming Engines arose from a June 2005 crash of a Piper aircraft equipped with a Lycoming engine, which the plaintiffs (the pilot and his wife) alleged was defective.[123] Following *Abdullah v. American Airlines, Inc.*[124] and *Elassaad v. Independence Air, Inc.*,[125] the court determined that federal aviation law and regulations preempted state standards of care in the aviation field: "[T]he *Abdullah* court thoroughly examined the leg-

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113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.* at 950.
117 *Id.* at 948–49 (quoting 14 C.F.R. § 91.13 (2010)).
118 508 F.3d 464 (9th Cir. 2007).
119 555 F.3d 806 (9th Cir. 2009).
120 *Keum*, 781 F. Supp. 2d at 950.
121 *Id.*
122 *Id.* at 955.
123 No. 4:10-CV-00843, 2011 WL 6339833, at *1 (M.D. Pa. Dec. 19, 2011).
124 181 F.3d 363, 368–69 (3d Cir. 1999).
125 613 F.3d 119, 127 (3d Cir. 2010).

islative history of the Aviation Act, and held that any independent state regulation would undermine [c]ongressional intent to create a 'single, uniform system of regulation.' . . . Federal standards of care appl[ied] to the Peases' state law claims."[126] The court noted that other district courts in the Third Circuit had rejected the argument that federal preemption "is not applicable to the entire field of aviation safety and therefore their state law claims [were] not precluded."[127]

Nevertheless, the court went on to decide that the plaintiffs were "not foreclosed from litigating claims relating to the airworthiness of the AH1A engine," rejecting Lycoming's reliance on the issuance of a type certificate as an absolute defense.[128] The plaintiffs alleged specific violations of numerous civil air regulations and federal air regulations.[129] The court granted summary judgment to Lycoming on some of these alleged breaches, but not on all.[130]

The court also denied Lycoming's motion for summary judgment on a claim under the Tennessee Products Liability Act of 1978 (the location of the crash was in Tennessee, and the court had earlier determined that Tennessee law applied).[131] Given the issuance of a type certificate, however, the court did allow Lycoming the benefit of a rebuttable presumption that the engine was not unreasonably dangerous.[132]

The court ended its opinion with an unusual "epilogue" in which it lamented "the inscrutability and limitations of *Abdullah*'s *ratio decidendi* as applied to aviation products liability cases."[133] Acknowledging the "tension" in allowing products liability suits to proceed against manufacturers who have a valid FAA type certificate, the court "strongly urge[d] the Third Cir-

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126 *Pease*, 2011 WL 6339833, at *12.

127 *Id.* at *11 (citing Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429, 432–40 (M.D. Pa. 2010); Landis v. US Airways, Inc., No. 07–1216, 2008 WL 728369, at *2, *4 (W.D. Pa. Mar. 18, 2008); Duvall v. Avco Corp., No. 4:CV 05–1786, 2006 WL 1410794, at *2–3 (M.D. Pa. May 19, 2006)).

128 *Id.* at *14.

129 *Id.* at *15–17.

130 *Id.*; *see* Pease v. Lycoming Engines, No. 4:10-CV-00843, 2011 WL 3667562, at *7 (M.D. Pa. Aug. 22, 2011) (an earlier decision in which the court denied Lycoming's motion to dismiss the amended complaint because the plaintiffs had cited specific federal standards of care).

131 *Pease*, 2011 WL 6339833, at *23.

132 *Id.* at *17.

133 *Id.* at *21.

cuit to clarify *Abdullah*'s application to aviation products liability cases or to limit *Abdullah* to its facts."[134]

B. Preemption Under the Airline Deregulation Act of 1978 (ADA)[135]

In *In re Korean Air Lines Co.*, the Ninth Circuit Court of Appeals held that the ADA applies to foreign and domestic air carriers equally, and therefore state-law claims regarding airfare prices that were asserted against foreign airlines were preempted.[136] The plaintiffs brought a putative class action (one of several against the defendants) based on state and federal antitrust and consumer protection laws, asserting that Korean Air Lines and Asiana Airlines conspired to impose illegal surcharges on airfares.[137] The district court dismissed the state-law claims based on ADA preemption, and the court of appeals affirmed (the court of appeals reversed the district court's refusal to allow the plaintiffs to reinstate their federal-law claims after they had earlier been voluntarily dismissed).[138]

The ADA provides that a "[s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ."[139] The plaintiffs argued that "Congress [had] statutorily defined 'air carrier' and 'foreign air carrier' as mutually exclusive terms," and thus the ADA's provisions regarding "air carriers" did not apply to "foreign air carriers."[140] Second, they argued that their state-law claims regarding the airfare surcharges were "not 'related' to the price of an air carrier and therefore [were] not preempted."[141] The court rejected both contentions.[142]

In rejecting the first contention, the Ninth Circuit held that an "examination of the [Federal Aviation Act] shows that Congress's use of the term 'air carrier' throughout the Act does not always correspond with that term's statutory definition and that 'air carrier' is sometimes used to refer generally to both domes-

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134 *Id.* at *23.
135 Airline Deregulation Act of 1978, 49 U.S.C. § 41713 (2006).
136 642 F.3d 685, 696 (9th Cir. 2011).
137 *Id.* at 689.
138 *Id.*
139 49 U.S.C. § 41713(b)(1).
140 *In re Korean Air Lines Co.*, 642 F.3d at 691.
141 *Id.* at 691–92.
142 *Id.*

tic and foreign airlines."[143] Because of the inconsistency, the term "air carrier" standing alone was "necessarily ambiguous," and therefore each statutory section in which the term appeared had to be analyzed for context.[144] The contextual reading of these sections revealed that "Congress intended that it apply to all air carriers and not only to domestic carriers."[145] In addition, the court of appeals held that its finding was reinforced by (1) a review of the ADA's purpose and legislative history;[146] (2) a review of case law where, although the issue was not explicitly discussed, courts (including the Supreme Court) applied ADA preemption of state-law claims to foreign airlines "without reservation";[147] (3) a "pragmatic concern" that, should preemption not apply, foreign air carriers would face burdens that domestic carriers do not, thus undermining the nation's "general preference for free trade" and also injuring consumers because foreign carriers would be less likely to enter the U.S. market;[148] and (4) a concern that the plaintiffs' approach discriminated against foreign carriers in contravention of U.S. "treaty obligations mandating nondiscrimination."[149]

In rejecting the plaintiffs' second contention, that their state-law claims did not "relate[ ] to a price" of an air carrier for purposes of ADA preemption, the court of appeals noted that the gravamen of the complaint was price-fixing, and therefore the "claims [were] plainly related to a price of an air carrier and consequently [were] preempted."[150] The court also rejected the plaintiffs' arguments on preemption regarding the alleged consistency of state laws with the purpose of the federal statute.[151] The court looked to the 2008 U.S. Supreme Court case of *Rowe v. New Hampshire Motor Transport Ass'n*,[152] which held that, for purposes of a preemption analysis, "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal

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[143] *Id.* at 692.

[144] *Id.* at 692–93 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 343–44 (1997)).

[145] *Id.* at 693.

[146] *Id.* at 693–95.

[147] *Id.* at 695–96.

[148] *Id.* at 696.

[149] *Id.*

[150] *Id.* at 696–97.

[151] *Id.* at 697.

[152] 552 U.S. 364 (2008).

regulation."[153] Finally, the court relied on *Rowe* to reject the plaintiffs' argument that the Supreme Court's cabining of the term "'relate to' in the ERISA preemption provision" showed an intent "to limit the ADA's preemption provision" as well.[154] In *Rowe*, the U.S. Supreme Court looked to the ADA's preemption provision to analyze the identical provision in the FAA Authorization Act.[155] The court of appeals held that "[i]f the Supreme Court intended to narrow the scope of these preemption provisions because of its ERISA decisions, it could have done so in *Rowe*, but it did not," and therefore the ERISA analysis was unavailing.[156]

On the other hand, in *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, the Northern District of Illinois found that the ADA did not preempt claims for compensation arising out of a delayed flight.[157] The plaintiffs, who arrived in Athens twenty-four hours behind schedule when their Iberia flight from Chicago was delayed, "filed [a] putative class action . . . alleging breach of contract based on Iberia's failure to pay compensation for [the plaintiffs'] delayed flight as required by Iberia's contractual conditions and Regulation No. 261/2004 of the European Parliament and European Council (EU 261)."[158] According to EU 261, "passengers on qualifying flights that are cancelled are entitled to a set amount of compensation so long as the cancellation was not caused by unavoidable extraordinary circumstances."[159]

The court noted the Supreme Court's carve-out of an exception to ADA preemption for breach-of-contract claims.[160] According to *American Airlines, Inc. v. Wolens*,[161] "the ADA does not 'shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.'"[162] The court accepted the plaintiffs' argument that Iberia "voluntarily agreed to abide by EU 261 by incorporating it into the conditions of con-

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153 *In re Korean Air Lines Co.*, 642 F.3d at 697 (quoting *Rowe*, 552 U.S. at 370–71).

154 *Id.*

155 *Id.*

156 *Id.*

157 No. 11 C 775, 2011 WL 3166159, at *2–3 (N.D. Ill. July 27, 2011).

158 *Id.* at *1.

159 *Id.*

160 *Id.* at *2.

161 513 U.S. 219 (1995).

162 *Giannopoulos*, 2011 WL 3166159, at *2 (quoting *Wolens*, 513 U.S. at 228).

tract."[163] While EU 261 does not explicitly provide for compensating passengers whose flights have been delayed, the district court noted that the European Court of Justice (ECJ) has interpreted EU 261 in this manner[164] and therefore deemed the ECJ's interpretation as binding.[165] "Thus, Iberia's agreement to pay compensation according to EU 261 must be read as an agreement to abide by EU 261, as interpreted by the ECJ."[166]

The court also addressed Iberia's argument that the Montreal Convention was preemptive, finding that "[e]ffectively, then, the Montreal Convention operates as a limitation on recovery not as a bar to a state law action."[167] While the court noted that EU 261's "standardized compensation" appeared that it might violate Article 29 of the Montreal Convention (which prohibits "non-compensatory damages"), the court declined to rule that the plaintiffs' claims were precluded by the Montreal Convention in the absence of further briefing on the issue.[168] The court was also not persuaded by Iberia's arguments that the plaintiffs' claims should be dismissed based on the Air Transport Agreement between the United States and the European Union,[169] the plaintiffs' failure to exhaust available remedies in the EU,[170] or principles of international comity.[171]

DiFiore v. American Airlines, Inc. resulted from a lawsuit brought by skycaps at Boston's Logan Airport, who were upset by a new mandatory two-dollar-per-bag fee to check bags curbside, which went to the airlines, not the skycaps.[172] The plaintiffs alleged that this fee, which was posted on signs at the terminal, resulted in lower tip income for them and, among other claims, violated a Massachusetts statute on tips.[173] The statute provides that "[n]o employer or other person shall demand . . . or accept from any . . . service employee . . . any payment or deduction from a tip or service charge given to such . . . service employee . . . by a patron."[174] As the court of appeals

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163 *Id.* at *3.
164 *See id.* at *1.
165 *Id.* at *3.
166 *Id.*
167 *Id.* at *4.
168 *Id.* at *5.
169 *Id.*
170 *Id.* at *6.
171 *Id.* at *7.
172 646 F.3d 81, 82 (1st Cir. 2011).
173 *Id.* at 84 (citing MASS. GEN. LAWS ch. 149, § 152A (2008)).
174 *Id.* (quoting ch. 149, § 152A(b) (alteration in original)).

put it, "[t]he gravamen of the tips law claim [was] that the [two-dollar] fee [was] a 'service charge' under state law (and must therefore [have gone] to the skycaps) because customers 'reasonably expect[ed]' it to be given to the skycaps."[175]

American moved for summary judgment on the tips law claim, citing the ADA's express preemption provision that provides that no state may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[176] The district court denied that motion, and the claim was tried before a jury in early 2008.[177] The jury found for the plaintiffs on the tips law claim and awarded damages and attorney fees.[178] American appealed.[179]

The court of appeals began by noting the three leading Supreme Court decisions on the preemptive effect of the ADA:[180] *Morales v. Trans World Airlines, Inc.*,[181] *American Airlines, Inc. v. Wolens*,[182] and *Rowe v. New Hampshire Motor Transport Ass'n.*[183] Those cases

> read the preemption language broadly, and none adopted [the] plaintiffs' position in [the case before the court] that [the court] should presume strongly against preempting in areas historically occupied by state law . . . . However traditional the area, a state law may simultaneously interfere with an express federal policy—[there], one limiting regulation of airlines.[184]

While the court took the "view that the Supreme Court would be unlikely—with some possible qualifications—to free airlines from most conventional common law claims for tort, from prevailing wage laws, and ordinary taxes applicable to other businesses," it concluded that applying the state tips law in these circumstances would expose American to requirements on "advertising and service arrangements [that] are just what Congress did not want states regulating," like modification of sign font

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175 *Id.*

176 *Id.* (quoting Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (2006)).

177 *Id.*

178 *Id.* at 84–85.

179 *Id.* at 85.

180 *Id.* at 86.

181 504 U.S. 374 (1992).

182 513 U.S. 219 (1995).

183 552 U.S. 364 (2008).

184 *DiFiore*, 646 F.3d at 86 (citations omitted).

and placement, permitting credit-card payments, and the like.[185] In light of the preemption, the court of appeals reversed the judgment below and remanded for entry of judgment in American's favor.[186]

Spinrad v. Comair, Inc. denied summary judgment to the airline defendant on a negligence claim.[187] The plaintiff was injured stepping off an aircraft operated by the defendant while the plane made an unscheduled stop at Norfolk airport.[188] The flight was scheduled to go from New York to Florida, but was forced to land in Norfolk because a passenger became ill en route.[189] The district court determined that the state-law negligence claim was not preempted because the plaintiff was not alleging any defective design in the airstairs that she used to step off the plane, but merely negligent conduct on the part of the airline's employees who should have been helping her, warning her, or using different means to get her off the aircraft.[190] As a result, it was "not a case that [fell] within the field of air safety. It concern[ed] a defendant's conduct aboard a non-airborne plane, and [the] plaintiff's claim [did] not depend on a theory of defective design."[191] The court likewise held that the ADA did not preempt the plaintiff's claim, either, "[b]ecause of the de minimis effect [the] plaintiff[']s claim [was] likely to have on [the] defendant's rates, routes, or services."[192] The court found a negligence claim unsuited to summary judgment and denied the motion.[193]

Similarly, in *Jimenez Ruiz v. Spirit Airlines*, the District of Puerto Rico ruled that the ADA did not preempt the territory's general negligence law when applied to a plaintiff who was injured during a fall when exiting an aircraft.[194] In *Jimenez*, the plaintiff slipped and fell while exiting a plane in Puerto Rico.[195] The plaintiff brought suit based upon the general law of negligence in that territory, claiming that the airline was negligent in failing

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185 *Id.* at 87–88.

186 *Id.* at 90.

187 825 F. Supp. 2d 397, 398 (E.D.N.Y. 2011).

188 *Id.* at 401.

189 *Id.*

190 *Id.* at 410–11.

191 *Id.* at 411.

192 *Id.* at 414.

193 *Id.*

194 794 F. Supp. 2d 344, 344 (D.P.R. 2011).

195 *Id.* at 345.

to provide a safe method of disembarkment.[196] The defendant airline claimed that the ADA, which governs the provision of services to air passengers and covers the rates and services provided by airlines to their customers, preempted the general law of negligence.[197] However, the court in that case ruled that the act of disembarking the plane "affect[ed] airline services in a too tenuous, remote, or peripheral manner."[198] Disembarking the plane was not a service provided to the passengers, but instead was simply a routine act and thus subject to general negligence law.[199] Therefore, the plaintiff's case was allowed to proceed.[200]

Aretakis v. Federal Express Corp. was a pro se lawsuit brought by a disappointed shipper of a package via Federal Express (FedEx).[201] Although the shipper approved leaving the package without requiring a signature, FedEx elected not to do so on its first delivery attempt, and the package ultimately reached its recipient three days later.[202] The plaintiff sued in state court for negligence, breach of contract, and violation of a New York consumer protection statute.[203] FedEx removed the case and moved for summary judgment largely on grounds of preemption under the ADA, which the magistrate judge recommended for most of the claims.[204]

Following the Second Circuit's instruction that the ADA "be applied on a case-by-case basis," the court determined that the state deceptive business practices count and the negligence count were preempted since "permitting the plaintiff to prosecute his negligence cause of action implicate[d], and [had] a direct effect on, FedEx's package transportation and delivery services."[205] While the breach-of-contract count was not preempted, the airbill limited liability to the lesser of $100 or actual

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196 *Id.*

197 *Id.* at 346.

198 *Id.* at 349 (internal quotation marks omitted).

199 *Id.* at 348.

200 *Id.* at 349.

201 No. 10 Civ. 1696(JSR)(KNF), 2011 WL 1226278, at *1 (S.D.N.Y. Feb. 28, 2011).

202 *Id.*

203 *Id.*

204 *Id.* at *1–2.

205 *Id.* at *3–4 (internal quotation marks omitted).

damages.[206] The district court adopted the magistrate judge's recommendation.[207]

In *Ginsberg v. Northwest, Inc.*, a passenger who had reached platinum elite status in Northwest's frequent flier program sued after his status was rescinded by the airline.[208] The plaintiff sued on the basis of state common-law contract claims, alleging a lack of good faith and fair dealing on the part of the airline for taking away his status improperly.[209]

After examining the history of the preemption precedent in the Ninth Circuit, the court of appeals held that the ADA was not meant to preempt common-law contract claims of the type alleged by the plaintiff.[210] While the ADA allowed airlines to compete over pricing and services, it did not state that all contractual claims against airlines are preempted by the law.[211] The court rejected the argument that the ADA preempted all state-law contract claims regarding airlines.[212] The court also rejected the argument that a frequent flier program was a "service" or that it related to pricing such that all claims surrounding it were preempted.[213] The court emphasized that "services" and pricing do not include ancillary services, such as serving drinks, and put the frequent flier program in the ancillary category: "A claim for breach of good faith and fair dealing does not relate to 'services' because it has nothing to do with schedules, origins, destinations, cargo, or mail."[214] Ultimately, the frequent flier program operated on the periphery of the airline's business and was too tenuously connected to the business of serving passengers to preempt the plaintiff's claims.[215]

In *Schultz v. United Airlines*, the court ruled that the ADA preempted the plaintiff's claims alleging (1) that the payment of a checked-bag fee created a contractual obligation on the part of the airline and (2) that a twenty-four-hour delay in delivery by the airline constituted a variety of breach-of-contract claims, including breach of the duty to covenant in good faith and unjust

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206 *Id.* at *6.

207 *See* Aretakis v. Fed. Express Corp., No. 10 Civ. 1696(JSR), 2011 WL 1197596, at *1 (S.D.N.Y. Mar. 25, 2011).

208 653 F.3d 1033, 1033 (9th Cir. 2011).

209 *Id.* at 1035.

210 *Id.* at 1037–41.

211 *Id.* at 1034–35.

212 *Id.* at 1040–42.

213 *Id.* at 1041–42.

214 *Id.* at 1042.

215 *Id.* at 1037, 1042.

enrichment.[216] The court found that the transportation of baggage was done pursuant to a "condition[ ] of carriage," as promulgated by the airlines and that that "condition[ ] of carriage," as created by each airline and provided to each consumer, was governed by the ADA.[217]

The plaintiff's claim that the airline created a "self-imposed" obligation to which the ADA did not apply, by charging a fee for checked baggage, was found to be without merit.[218] The choices as to whether to charge a bag fee and how much to charge were within the realm of competing services as covered by the ADA, and any attempt to impose additional requirements on checked-bag transportation was preempted.[219]

A similar issue was raised in *Hickcox-Huffman v. US Airways*.[220] In that case, the plaintiff attempted to bring a class-action suit against US Airways on behalf of a group of passengers who paid a fifteen-dollar baggage fee to the airline and whose luggage was subsequently lost or delayed.[221] The plaintiff argued that the baggage fee served as a contract that the luggage would be delivered safely and on time, and that the airline should be required to return the baggage fee when the luggage is lost or delayed.[222]

The court dismissed the plaintiff's proposed class, ruling that the assessment of baggage fees was an area in which the airlines were clearly competing, and that the ADA intended for them to compete without interference: "It is obvious that baggage fees are just one of many fronts on which airlines are doing competitive battle. . . . [the] [p]laintiff's claims would impermissibly 'frustrate the goals of economic deregulation by interfering with the forces of competition.'"[223] The court rejected the plaintiff's argument that, by adding a baggage fee, the airlines had not involved themselves in a "self-imposed undertaking."[224] The court ruled that, because there was no contractual obligation imposed upon US Airways by the baggage fee, there was no self-imposed obligation to return the baggage fees.[225] Thus, the

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216 797 F. Supp. 2d 1103, 1104 (W.D. Wash. 2011).

217 *Id.* at 1106.

218 *Id.* at 1106–07.

219 *Id.*

220 788 F. Supp. 2d 1036 (N.D. Cal. 2011).

221 *Id.* at 1037–38.

222 *Id.* at 1038.

223 *Id.* at 1041 (quoting Charas v. TWA, 160 F.3d 1259, 1263 (9th Cir. 1998)).

224 *Id.* at 1042.

225 *Id.* at 1042–43.

plaintiff's potential claims were preempted by the ADA, and the proposed class was struck down.[226]

In *Restivo v. Continental Airlines, Inc.*, the appellate court affirmed the dismissal of a purported class-action suit against Continental that challenged Continental's one-year expiration date on gift cards.[227] The suit was brought under Ohio consumer protection law, the Gift Card Statute, and for unjust enrichment.[228] The trial court determined that the ADA preempted the state statutory claims, and that the unjust-enrichment claim failed as well in light of an express contract.[229] The appellate court affirmed.[230]

The court noted that the ADA explicitly provides that "a [s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."[231] While the plaintiffs argued that the gift cards were merely a cash equivalent, the court agreed with Continental that the cards should be considered as relating to the service of an air carrier and therefore preempted under the ADA:

> It is not simply a financial transaction, as appellants argue, because its value derives from the intended purpose of securing goods or services from Continental in the future. Stated differently, the gift cards were purchased in lieu of an immediate, direct purchase of airline tickets. If appellants had directly purchased airline tickets, there would be no dispute that the tickets related to the airline's service. The fact that the gift card postpones the eventual purchase of an airline ticket does not alter the fact that the gift card is still related to the provision of air transportation.[232]

Finally, since the complaint itself alleged the existence of an express contract related to the gift cards, no claim for unjust enrichment could be maintained.[233]

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[226] *Id.*

[227] 947 N.E.2d 1287, 1287–88 (Ohio Ct. App. 2011).

[228] *Id.* at 1288.

[229] *Id.*

[230] *Id.* at 1291.

[231] *Id.* at 1289 (quoting Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (2006)).

[232] *Id.* at 1290.

[233] *Id.* at 1291.

In *ATA Airlines, Inc. v. Federal Express Corp.*,[234] the Seventh Circuit determined that the district court incorrectly ruled that a promissory-estoppel claim was preempted by the ADA, although it ultimately concluded that the claim (along with a breach-of-contract claim) failed for the independent reason that the alleged contract was fatally indeterminate.[235] The suit arose out of a relationship between ATA and FedEx in the context of the Department of Defense's so-called "Civil Reserve Air Fleet," which provides extra airlifting capacity for defense needs.[236] FedEx was the "team leader" in charge of submitting a bid to the Department of Defense, one made up of commitments from the smaller carriers that made up the "team" (several teams of airlines would compete for bids).[237] ATA was one of the smaller carriers on FedEx's team.[238]

In 2008, FedEx dropped ATA from the team, and ATA sued for breach of contract and promissory estoppel.[239] The alleged contract was in the form of a 2006 letter from FedEx to ATA.[240] While the district court held that ATA's promissory-estoppel claim was preempted by the ADA, it allowed the breach-of-contract claim to proceed to a jury trial, which resulted in a verdict for ATA.[241] FedEx appealed.[242]

The Seventh Circuit, in an opinion by Judge Posner, reversed the district court's ruling on preemption because "[p]romissory estoppel, as the word 'promissory' implies, furnishes a ground for enforcing a promise made by a private party, rather than for implementing a state's regulatory policies."[243] There was, therefore, no basis to enforce the ADA's preemption clause because a state may not "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[244]

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[234] 665 F.3d 882 (7th Cir. 2011).

[235] *Id.* at 884.

[236] *Id.*

[237] *Id.*

[238] *Id.* at 883.

[239] *Id.* at 883–84.

[240] *Id.* at 886.

[241] *Id.* at 883.

[242] *Id.*

[243] *Id.* at 884.

[244] *Id.* (quoting Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (2006)).

Ultimately, however, that did not result in a win for ATA, since the court found that the FedEx letter was too indefinite to be enforced by a court:

> Even if we assumed—unrealistically—that all the other holes that we mentioned in the team structure for 2007–2009 could be filled by a court from industry standards, course of dealing, trade usage, or some other objective source of guidance that enables judicial completion of an incomplete contract, the price term—FedEx's compensation for providing team leadership and transferring mobilization value points to team members—could not be supplied from any such source.[245]

And so the court reversed the judgment and instructed the district court to dismiss the suit with prejudice.[246]

Judge Posner concluded by chastising ATA's reliance on shoddy regression analysis and the district court's decision to allow such evidence to be presented at trial.[247] He not only explained why the expert's analysis was "fatally flawed," but also observed that "neither party's lawyers, judging from the trial transcript and the transcript of the Rule 702 hearing and the briefs and oral argument in [that] court, underst[ood] regression analysis; or if they [did] understand it they [were] unable to communicate their understanding in plain English."[248] This was reason alone to exclude such evidence: "If a party's lawyer cannot understand the testimony of the party's own expert, the testimony should be withheld from the jury. Evidence unintelligible to the trier or triers of fact has no place in a trial."[249]

C. Preemption Under the Government Contractor Defense

In *Getz v. Boeing Co.*, which arose from the February 2007 crash of an Army Chinook helicopter in Afghanistan, the Ninth Circuit determined that a British defendant was properly dismissed for lack of personal jurisdiction, and that the plaintiffs' claims against U.S. defendant contractors were preempted by the government contractor defense.[250]

The helicopter crashed after it encountered ice, rain, and snow on the way to Bagram Airbase, causing one of its engines

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245 *Id.* at 887.
246 *Id.* at 896.
247 *Id.*
248 *Id.* at 889.
249 *Id.* at 896.
250 654 F.3d 852, 857–60 (9th Cir. 2011).

to unexpectedly shut down, killing eight and severely injuring fourteen.[251] An initial Army investigation determined that the helicopter's engine control system (FADEC) unexpectedly shut down, and the engine control system's onboard computer (DECU) malfunctioned "due to some kind of electrical anomaly."[252] A second investigation, conducted by the manufacturers of the Chinook, posited that the engine experienced a water-induced flameout in the harsh weather, and that the flameout might have been avoided if the Chinook's engines had a continuous relight feature that would have allowed the engines to restart automatically.[253]

The plaintiffs, the injured servicemen and the heirs of the deceased, brought suit in California state court alleging state-law causes of action for products liability, negligence, wrongful death, and loss of consortium against Boeing (which designed the Chinook's airframe), Honeywell (which designed and built the engines), Goodrich Pump and Engine Control (which designed the FADEC), and the British company AT Engine Controls (ATEC) (which designed hardware and software for the DECU).[254] Boeing removed the case to federal court based on the Federal Officer Removal Statute, 28 U.S.C. § 1442(a).[255] The district court dismissed ATEC and granted summary judgment to Boeing, Honeywell, and Goodrich (collectively, the U.S. contractors).[256]

In first affirming the dismissal of ATEC for lack of personal jurisdiction, the Ninth Circuit's discussion centered on Federal Rule of Civil Procedure 4(k)(2), the federal long-arm statute, which "permits federal courts to exercise personal jurisdiction over a defendant that lacks contacts with any single state if the complaint alleges federal claims and the defendant maintains sufficient contacts with the United States as a whole."[257] The only question before the court was whether the plaintiffs satisfied the first few words of Rule 4(k)(2) that refer to "a claim that arises under federal law."[258] In other words, did "any of [plaintiffs'] claims against ATEC—pure state-law claims for product

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251 *Id.* at 857.

252 *Id.*

253 *Id.* at 857–58.

254 *Id.* at 858.

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.* (quoting FED. R. CIV. P. 4(k)(2)).

liability, negligence, wrongful death, and loss of consortium—arise under federal law?"[259] The plaintiffs argued that their claims arose under federal law because of the defendants' removal pursuant to the Federal Officer Removal Statute; once the defendants asserted a federal defense in their removal petition, the plaintiffs argued their own claims became "substantively federal."[260] The court of appeals rejected this argument, noting the Supreme Court's decision in *Arizona v. Manypenny*,[261] where the Supreme Court explained that "the invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied."[262] Thus, the Ninth Circuit found, "[t]he existence of a federal defense does not transform purely state-law claims into 'federally created cause[s] of action.'"[263] The court also rejected the plaintiffs' contention that the district court should have allowed jurisdictional discovery to determine whether ATEC had minimum contacts with California.[264] The court found that the plaintiffs had not asserted "any specific facts, transactions, or conduct that would give rise to personal jurisdiction over ATEC in California."[265] Because an inquiry into ATEC's minimum contacts would be founded on "purely speculative allegations," the district court did not abuse its discretion in denying the plaintiffs' request for discovery on this point.[266]

The court then addressed the government contractor defense.[267] "Th[e] defense protects government contractors from tort liability that arises as a result of the contractor's compliance with the specifications of a federal . . . contract."[268] The Supreme Court's decision in *Boyle v. United Technologies Corp.*[269] provides the three elements that must be established for the defense to be found: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States

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259 *Id.*

260 *Id.* at 859–60.

261 451 U.S. 232 (1981).

262 *Getz*, 654 F.3d at 860 (quoting *Manypenny*, 451 U.S. at 242).

263 *Id.*

264 *Id.*

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.* (citation omitted).

269 487 U.S. 500 (1988).

about the dangers in the use of the equipment that were known to the supplier but not to the United States."[270]

The focal point of the plaintiffs' claims was that the Chinook's ignition system was defective because it lacked the continuous relight function; also defective were the FADEC, the DECU, and the helicopter itself.[271] The Ninth Circuit measured each of these allegations against *Boyle*'s framework and found that the U.S. contractors established all three elements of the government contractor defense.[272]

First, the court observed that Honeywell provided the Army with complete engine specifications.[273] The court noted that Honeywell's specifications explicitly stated that the continuous relight function would not be provided, and thus "Honeywell's specifications describe[d], in reasonable detail, the design feature alleged to be defective."[274] The court further noted that the Army's approval of the designs resulted from "careful deliberation, not a rubber stamp."[275] The court repeated this analysis with regard to the FADEC-DECU and found that the "Army also approved reasonably precise specifications for [their] design. . . ."[276] and that the "Army carefully scrutinized, tested, and made necessary changes to the FADEC-DECU."[277] The court rejected the plaintiffs' contention that the aircraft as a whole was defective, based on the court's analysis regarding the ignition system and FADEC-DECU.[278]

The court then turned to the second element of the government contractor defense: conformity with government-approved specifications.[279] The court followed decisions from other circuits and held that "absent some evidence of a latent manufacturing defect, a military contractor can establish conformity with reasonably precise specifications by showing '[e]xtensive government involvement in the design, review, development and testing of a product' and by demonstrating 'extensive accept-

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270 *Getz*, 654 F.3d at 861 (quoting *Boyle*, 487 U.S. at 512).

271 *Id.*

272 *Id.* at 861–65.

273 *Id.* at 861.

274 *Id.*

275 *Id.* (citation omitted).

276 *Id.* at 862.

277 *Id.* at 863.

278 *Id.* at 863–64.

279 *Id.* at 864.

ance and use of the product following production.'"[280] The court found just that in the case before it: "Because [the] [p]laintiffs [did] not present any evidence of a latent manufacturing defect that was undiscovered at the time of acceptance, the government's careful scrutiny and subsequent certification of the MH-47E provide[d] sufficient proof of conformity."[281] It made no difference that the "engine obviously did not perform like it was supposed to."[282] Otherwise, the court reasoned, following precedent from other circuits, the defense would have no substance since no government-approved specifications "would purposefully allow a design that would result in an accident."[283] *Boyle*'s test for conformity was satisfied by "undisputed evidence that the ignition system and the DECU conformed with the reasonably precise design specifications approved by the Army."[284]

In finding that the U.S. contractors satisfied the last element of the defense, the court noted that "a government contractor is only responsible for warning the government of dangers about which it has actual knowledge,"[285] and that *Boyle* "does not require a contractor to warn about dangers of which it merely should have known"[286] or that a contractor "warn of dangers that were already known to the United States."[287]

Finally, the Ninth Circuit separately examined the plaintiffs' state-law failure-to-warn claims.[288]

> [A] contractor cannot defeat a failure-to-warn claim simply by establishing the elements of the *Boyle* defense as it applies to design-defect and manufacturing-defect claims. Rather, the contractor must show that it "act[ed] in compliance with 'reasonably precise specifications' imposed on it by the United States" in deciding "whether to provide a warning."[289]

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[280] Id. (quoting Kerstetter v. Pac. Scientific Co., 210 F.3d 431, 435–36 (5th Cir. 2000)).

[281] *Id.*

[282] *Id.* at 865.

[283] *Id.* (quoting Kleemann v. McDonnell Douglas Corp., 890 F.2d 698, 703 (4th Cir. 1989)).

[284] *Id.*

[285] *Id.* (quoting *Kerstetter*, 210 F.3d at 436).

[286] *Id.* at 866.

[287] *Id.*

[288] *Id.*

[289] *Id.* (citation omitted).

The court found this element satisfied based on the Army's determination of which warnings were to be provided in the operator's manual.[290]

D. Preemption Under the Death on the High Seas Act

In *Helman v. Alcoa Global Fastener, Inc.*,[291] the Ninth Circuit determined that the Death on the High Seas Act (DOHSA)[292] applied in the area between three and twelve nautical miles from the shore of the United States and thus preempted state-law claims brought by the personal representatives of three U.S. Navy crewmen killed in a helicopter crash nine and one-half nautical miles off the coast of Catalina Island, California.[293] Specifically, the Ninth Circuit affirmed the district court's determination

> that DOHSA applies to noncommercial aircraft accidents beyond three nautical miles from shore, and that Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) ("Proclamation 5298"), which extended the territorial sea of the United States from three to twelve nautical miles from shore, did nothing to alter DOHSA's applicability.[294]

In reaching its finding, the district court relied on then-Judge Sonia Sotomayor's dissent in *In re Air Crash Off Long Island, New York, on July 17, 1996 (TWA Flight 800 Case)*.[295]

The issue before the Ninth Circuit was the definition of the term "high seas" as it is used in DOHSA, which applies "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond [three] nautical miles from the shore of the United States."[296] The Second Circuit in the *TWA Flight 800 Case* determined "that 'high seas' as used in DOHSA refers to . . . international waters and that Proclamation 5928, by extending U.S. territorial waters from three to twelve nautical miles from shore, effectively changed the inner-

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[290] *Id.* at 866–67.

[291] 637 F.3d 986 (9th Cir. 2011).

[292] Death on the High Seas Act, 46 U.S.C. § 30301–08 (2006).

[293] *Helman*, 637 F.3d at 987–88.

[294] *Id.* at 988–89 (internal quotation marks omitted).

[295] *Id.* at 989–90 (citing *In re* Air Crash Off Long Island, N.Y., on July 17, 1996, 209 F.3d 200, 215 (2d Cir. 2000)).

[296] *Id.* at 989 (quoting Death on the High Seas Act, 46 U.S.C. § 30302 (2006)).

boundary of DOHSA's applicability to twelve nautical miles from shore."[297]

The Ninth Circuit found instead that "[a] plain reading of the statutory text" led to the conclusion that "there is no indication that [the term 'high seas'] was meant to incorporate into the statute the independent and fluid political concept of U.S. territorial waters."[298] Rather, "the term 'high seas' is defined for purposes of the statute by the explicitly stated geographic boundary of 'beyond three nautical miles' from shore."[299]

The court found support for its conclusion in recent congressional amendments to DOHSA.[300] In 2006, the phrase "beyond a marine league" in DOHSA's text was replaced by "beyond three nautical miles."[301] "Notably, then, Congress reinforced the geographic boundary specified within DOHSA's text even after Proclamation 5928's extension of the U.S. territorial waters to twelve nautical miles from shore."[302] Had Congress intended to change DOHSA applicability, the court concluded, it would have done so.[303] In 2000, Congress amended DOHSA so that it would "not apply if the death resulted from a commercial aviation accident occurring on the high seas [twelve] nautical miles or less from the shore of the United States."[304] The amendment, the court reasoned, could only mean that "a portion of the 'high seas' as used in DOHSA lies within twelve nautical miles from shore."[305] Otherwise, the language of the amendment would be "nonsensical."[306] The court "acknowledged" the Second Circuit's opposite conclusion in the *TWA Flight 800 Case*, but also pointed out that that decision came down before the 2000 and 2006 amendments to DOHSA, which aided the Ninth Circuit in reaching its holding.[307]

Lastly, the court noted further reasons, above and beyond the plain reading of the statute, that supported its holding that Proclamation 5928 did not change the geographical boundaries

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297 *Id.* at 989–90 (citing *In re Air Crash Off Long Island*, 209 F.3d at 202, 205, 215).

298 *Id.* at 990.

299 *Id.* at 990–91.

300 *Id.* at 991.

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.* (citing Death on the High Seas Act, 46 U.S.C. § 30307(c) (2006)).

305 *Id.*

306 *Id.*

307 *Id.* at 992.

of DOHSA.[308] "First, . . . Proclamation [5928] explicitly state[d] that it [did] not 'extend or . . . alter existing [f]ederal or [s]tate law or any jurisdiction, rights, legal interests, or obligations derived therefrom.'"[309] Second, while Congress chose to amend certain maritime statutes in response to Proclamation 5928, DOHSA was not among them.[310] Third, while the President has "the authority to extend or contract the territorial sea pursuant to his constitutionally delegated power over foreign relations," the "power to create and alter the scope of federally-created remedies for victims of wrongful acts, however, remains squarely within Congress."[311] "[N]othing in the record [before the court] suggest[ed] that Congress intended to delegate to the executive branch the power to determine the scope of DOHSA. . . ."[312]

E. Preemption Under 49 U.S.C. § 44112 (Aircraft Lessor Liability)

In *Vreeland v. Ferrer*,[313] the Florida Supreme Court took a limited view of the preemptive scope of 49 U.S.C. § 44112, which limits the liability of a "lessor, owner, or secured party" for harm "on land or water" to situations "only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party" and the harm "occurs because of—(1) the aircraft, engine, or propeller; or (2) the flight of, or an object falling from, the aircraft, engine, or propeller."[314] In the Florida Supreme Court's view, the "on land or water" provision serves to preempt only state-law claims involving victims who were outside the aircraft when injured, not (as in that case) a victim who was riding inside the aircraft, even if it could be said that the victim was injured "on land" as the result of a crash.[315]

The case involved an aircraft leased by Danny Ferrer from a company called Aerolease of America, Inc.[316] In January 2005,

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308 *Id.*

309 *Id.* (citing Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988)).

310 *Id.* at 993.

311 *Id.*

312 *Id.*

313 71 So. 3d 70 (Fla. 2011).

314 *Id.* at 72 (citing 49 U.S.C. § 44112 (1994)).

315 *Id.* at 84–85.

316 *Id.* at 72.

the aircraft crashed shortly after takeoff in Lakeland, Florida.[317] A pilot as well as a passenger named Jose Martinez were on board.[318] The representative of the estate of a passenger killed in the crash brought a wrongful-death suit against Aerolease as the aircraft's owner.[319] The suit made two main claims under state law: first, that Aerolease was vicariously liable for the pilot's negligent operation of the aircraft; and second, that there was direct negligence on Aerolease's part when, before transferring the aircraft to Ferrer, it performed inspection and maintenance.[320]

Aerolease moved for summary judgment based on federal preemption under 49 U.S.C. § 44112(b), which the trial court granted.[321] The statute provides in relevant part:

> A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—
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> (1) the aircraft, engine, or propeller; or
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> (2) the flight of, or an object falling from, the aircraft, engine, or propeller.[322]

Under Florida's "dangerous instrumentality" doctrine, an owner or lessor of an aircraft can be held vicariously liable for a pilot's negligence.[323] The trial court agreed with Aerolease, however, that Section 44112 preempted any liability under that doctrine, or for its own alleged negligent inspection and maintenance, because Aerolease was not in actual possession of the aircraft at the time of the crash.[324] The plaintiff appealed, and the intermediate appellate court issued a split decision: it affirmed the judgment for Aerolease on the preemption of vicarious liability but allowed the claim to proceed based on Aerolease's own alleged negligence, which allegedly occurred when the aircraft

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317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.*

321 *Id.*

322 *Id.* (citing 49 U.S.C. § 44112(b) (1994)).

323 *Id.*

324 *Id.* at 72–73.

was in Aerolease's possession.[325] The plaintiff appealed the adverse ruling, and the Florida Supreme Court reversed.[326]

The key question was whether the phrase "personal injury . . . on land or water" includes a victim of a plane crash who dies on impact with the earth.[327] If so, then generally the federal statute would preempt a state-law claim against a lessor, owner, or secured party that is not in actual possession or control of the aircraft.[328] Based on the statute's legislative history, the Florida Supreme Court answered that question in the negative and allowed the plaintiff to pursue his claim for vicarious liability against Aerolease.[329]

The Florida Supreme Court relied heavily on a House of Representatives report accompanying the original version of the statute enacted in 1948, Section 504 of the Civil Aeronautics Act, and determined that Congress wanted to shield people who own aircraft for security purposes only but lack control over the aircraft's operation, by removing the risk that such an owner could be held liable based on such ownership.[330] In particular, the Florida Supreme Court determined that, in the 1948 statute, "[t]he language clearly references airplane owner/lessor liability for damages to persons and property that are *on the surface of the earth*," as opposed to people riding in the aircraft.[331] As an example of state law that would be preempted, the House of Representatives report cited the Uniform Aeronautics Act, which was then in force in several states.[332] The Uniform Aeronautics Act apparently "imposed 'absolute liability on owners of aircraft for damage caused on the surface of the earth,'" meaning people or property on the ground, and it was this absolute liability that the federal statute was meant to preempt.[333] By contrast, the Florida Supreme Court noted that "the Uniform Aeronautics Act contained a separate section that addressed injuries to airmen or passengers who were in the plane at the time of the incident"[334] and concluded that the scope of federal pre-

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325 *Id.*
326 *Id.* at 85.
327 *Id.* at 80.
328 *Id.*
329 *Id.* at 80–81.
330 *Id.* at 78–79.
331 *Id.* at 79.
332 *Id.* at 80.
333 *Id.* (quoting H.R. REP. NO. 80-2091 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1836, 1837).
334 *Id.*

emption in the 1948 act was not meant to extend to such injuries.[335]

The Florida Supreme Court traced the history of the original 1948 act through the years: 1958—when it was incorporated into the new Federal Aviation Act; 1959—when it was broadened to include owners of engines, propellers, and aircraft; and then 1994—"when, as part of a revision of Title 49 of the United States Code, which governs transportation, it was merely reworded and recodified without substantive change as [S]ection 44112(b)."[336] Ultimately, the Florida Supreme Court concluded "that by adopting a federal law that specifically referenced damages or injuries that occur on the surface of the earth, the 1948 Congress did not intend to preempt state law with regard to injuries to passengers or aircraft crew."[337] The Florida Supreme Court supported its decision with citations to other case law with the same result.[338] A dissenting justice contended that the court's interpretation defied the plain meaning of the statutory language: "Even though Martinez was in the aircraft when it hit land, his death occurred 'on land,' not in the aircraft prior to contact with land. The majority's view is inconsistent with the plain meaning of the statute, specifically the plain meaning of 'on land.'"[339]

Aerolease filed a petition for certiorari in the U.S. Supreme Court, which the Court denied in February 2012.[340]

III. FEDERAL SUBJECT MATTER JURISDICTION, REMOVAL, AND REMAND

In *Brown v. Alaska Air Group, Inc.*, the court denied a motion for remand.[341] The eighty-four-year-old plaintiff fell while crossing the tarmac shortly after deplaning at Seattle-Tacoma International Airport and sued the airlines from whom she had bought her tickets for failure to comply with the requirements of the federal Air Carrier Access Act (ACAA) for disabled passengers, as well as for state-law claims for discrimination, breach of contract, and negligence.[342] The defendants removed the

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335 *Id.*

336 *Id.* at 79.

337 *Id.* at 81.

338 *Id.* at 82.

339 *Id.* at 85–86 (Polston, J., dissenting).

340 Aerolease of Am. v. Vreeland, 132 S. Ct. 1557 (Feb. 21, 2012).

341 No. CV-11-0091-WFN, 2011 WL 2746251, at *5 (E.D. Wash. July 14, 2011).

342 *Id.* at *1.

case, relying on the doctrine of field preemption.[343] The federal court held that it was entitled to exercise subject matter jurisdiction over the case:

> [T]his Court finds pervasive regulations on the subject of failure to provide transport services between planes. Specifically, the ACAA and its regulations require airlines to provide "the services of personnel and the use of ground wheelchairs, accessible motorized carts, boarding wheelchairs, and/or on-board wheelchairs" and provide assistance in transporting a disabled passenger, between her arriving and connecting flight.[344]

Noting furthermore that, in the ACAA, Congress provided for an administrative remedy scheme, the court determined that removal was appropriate.[345]

In *Gardiner v. Kelowna Flightcraft, Ltd.*, a district court determined that 28 U.S.C. § 1332 (the diversity jurisdiction statute) did not provide federal jurisdiction over a dispute involving the plaintiff's decedent, who was a foreign national and a permanent U.S. resident, and the defendant, a foreign company.[346] The court found that to hold otherwise would run afoul of Section 2 of Article III of the Constitution.[347]

The case arose out of a fatal plane crash in Ohio.[348] The plaintiff, the decedent's widow, brought suit against Kelowna Flightcraft, a Canadian company, in Ohio state court, and Kelowna removed based on diversity of citizenship.[349] Because the motion to remand implicated the constitutionality of 28 U.S.C. § 1332, the court allowed the United States to intervene, supporting the plaintiff's argument against federal jurisdiction.[350]

At the heart of matter was the "deeming clause" of 28 U.S.C. § 1332: "For purposes of this section, . . . an alien admitted to the United States for permanent residence shall be deemed a

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[343] *Id.*

[344] *Id.* at *5 (quoting 14 C.F.R. § 382.95(a) (2009); 14 C.F.R. § 382.91 (2009)) (citing Martin *ex rel.* Heckman v. Midwest Exp. Holdings, Inc., 555 F.3d 806, 809 (9th Cir. 2009)).

[345] *Id.*

[346] No. 2:10-cv-947, 2011 WL 3904997, at *1, *7 (S.D. Ohio Sept. 6, 2011).

[347] *Id.* at *3.

[348] *Id.* at *1.

[349] *Id.* The court first reviewed competing evidence to determine that the decedent, who had been domiciled in Florida, was a citizen of the Bahamas with permanent U.S. resident status. *Id.*

[350] *Id.* at *2.

citizen of the [s]tate in which such alien is domiciled."[351] The defendant urged the court to find federal jurisdiction based on the plain meaning of the statute,[352] as the decedent would thus be deemed a citizen of Florida (where he had been a resident),[353] and the lawsuit would be one between "citizens of a [s]tate and citizens or subjects of a foreign state."[354] On the other hand, the plaintiff and the United States pointed out that such a reading would expand federal jurisdiction beyond what is established in Section 2 of Article III of the Constitution.[355] The court stated that "while Article III, [Section] 2 allows for suits 'between a State, or the Citizens thereof, and foreign States, Citizens or Subjects,' it does not permit actions between aliens."[356] The court noted that the Supreme Court in *Hodgson v. Bowerbank*[357] had long ago determined "that if the Judiciary Act of 1789 were interpreted to allow suits solely between aliens in federal courts, the statutory provisions would be unconstitutional."[358] The court determined, supported by a review of legislative history, "that the deeming provision was intended by Congress to restrict as opposed to expand diversity jurisdiction in cases involving permanent resident aliens," and thus construed 28 U.S.C. § 1332 in a manner that preserved the statute's constitutionality.[359] Significantly, the case before the court involved "aliens on both sides of the dispute,"[360] and was thus distinguishable from cases that involved at least one citizen party and aliens,[361] which would not raise the same constitutional issues.[362]

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[351] *Id.* at *3 (quoting 28 U.S.C. § 1332 (2006)).

[352] *Id.*

[353] The citizenship of the decedent, rather than the plaintiff widow who was suing as personal representative of his estate, was determinative because, according to §1332(c)(2), "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same [s]tate as the decedent." *Id.* (quoting 28 U.S.C. § 1332 (c)(2)).

[354] *Id.* at *3 (quoting 28 U.S.C. § 1332 (a)(2)).

[355] *Id.*

[356] *Id.* (quoting U.S. CONST. art. III, § 2).

[357] 9 U.S. (5 Cranch) 303, 304 (1809).

[358] *Gardiner*, 2011 WL 3904997, at *3.

[359] *Id.* at *6.

[360] *Id.* at *5.

[361] *Id.*

[362] The court noted that the Constitution requires only minimal diversity, as opposed to complete diversity: "While statutes vesting the district courts with diversity jurisdiction have usually been interpreted to require complete diversity—that is, no plaintiff can share citizenship with any defendant—Article III, [Section] 2 of the Constitution itself has been construed to only require minimal

In re Hudson River Mid-Air Collision on August 8, 2009[363] was a wrongful-death case arising from a midair collision between a Piper N71MC airplane and a Eurocopter N401LH carrying passengers on a sightseeing tour of New York City that caused both aircraft to plummet into the Hudson River.[364] The district court dismissed the admiralty and maritime claims asserted by the representatives of the Eurocopter's deceased passengers.[365] The court began with the applicable rule that "a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity."[366] The location test was easily satisfied, since the aircraft "crashed over the Hudson River and landed in navigable waters."[367]

However, the court was not persuaded that "the activity of taking a helicopter tour over the Hudson River has a substantial relationship to traditional maritime activity."[368] The court reasoned:

> This case will ultimately be about whether there were errors made by the air traffic controller, and the Piper and Eurocopter pilots, not about issues within "admiralty's area of particular competence [such as] maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage."[369]

The Eurocopter sightseeing tour was not an "activity traditionally performed by [a] waterborne [vessel] . . . . There are many ways to sightsee around the Hudson River, whether it [be] by foot, by vehicle, by boat, or by air."[370]

Yellen v. Teledyne Continental Motors, Inc. arose from a fatal aircraft accident on May 10, 2010, in Alabama, involving two Tennessee citizens in a Cirrus SR-22 aircraft equipped with an engine manufactured by Teledyne Continental Motors, Inc.

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diversity, meaning that only one set of opposing parties must be diverse." *Id.* at *5 (citing State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967)).

363 No. 09-6142(DMC)(JAD), 2011 WL 2463527 (D.N.J. June 17, 2011).

364 *Id.* at *1.

365 *Id.* at *3.

366 *Id.* at *1 (quoting Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)).

367 *Id.*

368 *Id.*

369 *Id.* at *2 (quoting Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 270 (1972)).

370 *Id.*

(TCM).[371] The plaintiffs filed suit in Pennsylvania state court against TCM, its then-parent company Teledyne Technologies, Inc., and three other entities (at one time affiliated in some way with TCM) headquartered in Pittsburgh, Pennsylvania, as well as against Cirrus-related entities.[372] The plaintiffs alleged products liability claims under state law including strict liability, negligence, and breach of warranties, along with a count for negligent infliction of emotional distress.[373]

The defendants removed the action on two alternative grounds: (1) federal question jurisdiction in light of the FAA's role in certifying the engine in question; and (2) diversity jurisdiction, since the parties were completely diverse apart from the three located in Pittsburgh, which the defendants contended were fraudulently joined solely to prevent removal (due to the so-called "forum defendant rule" of 28 U.S.C. § 1441(b)).[374] The plaintiffs moved to remand, and the court granted the motion.[375]

The court declined to exercise federal question jurisdiction over the case.[376] The court noted that the Supreme Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* had observed: "'[I]n certain cases federal-question jurisdiction will [also] lie over state-law claims that implicate significant federal issues,' even if they are not raised directly."[377] However, following the lead of the later decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*,[378] which stated that *Grable* represents a "special and small category" of cases,[379] the district court found that, among other reasons, "though [those] claims ar[ose] against the backdrop of a federal aviation regulatory scheme, they sound[ed] in run-of-the-mill state tort law."[380] The district court took the view that state "law applies to aviation accident cases even if the relevant standard of care is imported from the federal regulatory regime."[381]

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371 832 F. Supp. 2d 490, 492 (E.D. Pa. 2011).

372 *Id.*

373 *Id.*

374 *Id.* at 492–93.

375 *Id.* at 493.

376 *Id.* at 500.

377 *Id.* at 497 (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005)).

378 547 U.S. 677, 699 (2006).

379 *Id.*

380 *Yellen*, 832 F. Supp. 2d at 499.

381 *Id.*

The court also determined that diversity jurisdiction did not exist over the action because there was some possibility that the Pittsburgh defendants could be held liable and, therefore, the forum defendant rule precluded removal.[382] First, a corporate predecessor of TCM could be held liable on a negligent-design claim, even if it was no longer affiliated with TCM at the time of the engine's manufacture and sale in 2005.[383] Second, the corporate structure and reorganization of the Pittsburgh defendants had not foreclosed their liability in the case.[384]

In *Weidler v. Professional Aircraft Maintenance*,[385] a wrongful-death action arising from a crash of an airplane in Baja, California, the Central District of California found that the defendant FAA-certified repair station's removal to federal court pursuant to 28 U.S.C. § 1442 (the Federal Officer Removal Statute) was proper and therefore denied the plaintiffs' motion to remand.[386]

The court noted the basics of removal pursuant to the Federal Officer Removal Statute in the Ninth Circuit: "'[F]ederal officers can remove both civil and criminal [actions] . . . a federal officer can remove a case even if the plaintiff couldn't have filed the case in federal court in the first instance,' removals under [the statute] are not subject to the well-pleaded complaint rule," and an officer qualifying under the statute could remove the case unilaterally.[387] In order for the defendant Wood Group, the FAA-certified facility, to qualify under the statute, it "must [have] satisf[ied] three elements: (1) it [was] a 'person' within the meaning of the statute; (2) it acted under the direction of a federal officer by demonstrating a causal nexus between plaintiffs [sic] claims and acts it performed under color of federal office; and (3) it ha[d] raised a colorable federal defense."[388]

The court found that Wood Group satisfied all three elements.[389] First, as a private corporation, it qualified as a "person" for purposes of the statute.[390] Second, Wood Group

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382 *Id.* at 501–09.

383 *Id.* at 507.

384 *Id.* at 508.

385 No. CV 10-09376 SJO (CWx), 2011 WL 2020654 (C.D. Cal. May 13, 2011).

386 *Id.* at *2.

387 *Id.* at *1 (citing Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1253 (9th Cir. 2006) (citations omitted)).

388 *Id.*

389 *Id.* at *2.

390 *Id.*

established that it was "acting under" an officer of the United States:

> Defendant Wood Group was acting pursuant to an Air Agency Certificate issued by the FAA under 14 C.F.R. [§] 145. Under its 14 C.F.R. [§] 145.201 authority, Defendant Wood Group claim[ed] that it performed maintenance, preventive maintenance and alternations in accordance with 14 C.F.R. [§] 143 and returned to service any work it performed and certified planes as airworthy under the authority of the FAA.[391]

The court disposed of the plaintiffs' arguments to the contrary on this point by noting that 49 U.S.C. § 44702(d) grants the FAA "the power to 'delegate to a qualified private person' matters relating to examination, inspection, and certification."[392] "Because the FAA delegated [the power to certify aircraft components' airworthiness] to [the] [d]efendant Wood Group through an Air Agency Certificate, [the] [d]efendant Wood Group ha[d] sufficiently demonstrated that it was 'acting under' the authority of the FAA."[393] Third, the court found that Wood Group raised "a colorable [federal] defense that it complied with [FAA rules and regulations and that it] maintained, repaired, serviced, licensed, and otherwise certified as airworthy" the subject aircraft's engine "pursuant to the Air Agency Certificate and as supervised and overseen by the FAA."[394]

IV. PERSONAL JURISDICTION

In *Kraut v. Raisbeck Engineering, Inc.*, an unpublished decision from the appellate division of the Superior Court of New Jersey arising from a plane crash that killed five members of a family, a North Carolina maintenance and repair facility was found to have insufficient minimum contacts with New Jersey to establish personal jurisdiction.[395]

The defendant Air Wilmington (AW), a North Carolina corporation with a single facility in Wilmington, North Carolina, provided refueling and service work for the pilot, Dr. Jon Kraut.[396] As the court noted, AW had no physical presence in New Jersey, did not pay taxes there, and did not actively adver-

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391 *Id.*

392 *Id.* (quoting 49 U.S.C. § 44702(d)(1) (2006)).

393 *Id.*

394 *Id.*

395 No. A-4336-09T2, 2011 WL 3586136, at *1 (N.J. Super. Ct. App. Div. Aug. 17, 2011) (unpublished per curiam opinion).

396 *Id.* at *1–2.

tise there.[397] AW service personnel would sometimes pilot planes to New Jersey upon request, and the company sent follow-up form letters to the owners of aircraft who had used its facility or had landed at the adjacent airport, with some twenty out of 785 such letters being sent to New Jersey residents.[398] The plaintiffs alleged that AW was identified on the website of an aviation fuel supplier as a convenient stop for customers piloting between New Jersey and the Bahamas; however, the fuel supplier never told AW it would mention New Jersey on the website, and the advertisement appeared on the website nearly three years after the crash.[399] Lastly, the plaintiffs and AW disputed whether AW knew that Dr. Kraut was a New Jersey resident.[400]

In finding against jurisdiction, the court noted that AW "accepted business from a New Jersey customer on an ongoing basis. He was one of many customers from many states. All of the business from this customer was conducted at [AW's] sole facility in North Carolina. It was business that [AW] did not reach into New Jersey to solicit."[401] It also found that AW's "possible knowledge that the Krauts lived in New Jersey [was not] dispositive of the jurisdictional issue."[402] Based on these circumstances, AW "could not have reasonably expected to be haled into court in New Jersey."[403]

In *Burdick v. Dylan Aviation, LLC*, a Montana federal district court denied a defendant-helicopter owner's motion to dismiss for lack of personal jurisdiction in a wrongful-death action, finding the ties between the defendant and its corporate parent, which was doing business in Montana, to be dispositive of the issue.[404] The plaintiff's decedent, Mark Burdick, was performing a visual inspection of a power line in Montana in the course of his employment with Haverfield Corporation when the helicopter he was flying in suddenly lost power and crashed.[405] Burdick, who was seated in the rear, was killed, while the pilot and

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397 *Id.* at *2.

398 *Id.*

399 *Id.* at *2–3.

400 *Id.* at *3–5.

401 *Id.* at *10.

402 *Id.* at *5.

403 *Id.* at *10.

404 No. CV 10-48-BLGT RFC, 2011 WL 2462577, at *8 (D. Mont. June 17, 2011).

405 *Id.* at *1.

front-seat passenger were seriously injured.[406] The helicopter was owned by the defendant Dylan, "a limited liability company whose sole business [was] buying helicopters and leasing them to Haverfield" and also ensuring that the helicopters were airworthy.[407] The court noted the intimate ties between Dylan and Haverfield: among other factors, each member of Dylan was also an employee of Haverfield, Dylan had "'general knowledge' of where Haverfield was doing business," and "Dylan's records for [the fallen helicopter were] maintained in Haverfield's office. . . ."[408]

The court reasoned that specific long-arm jurisdiction was appropriate under Montana law because Burdick's tort claims accrued in Montana and because the exercise of jurisdiction comported with due process.[409] Dylan received due process because the three-part test, established by the Montana Supreme Court after adopting the Ninth Circuit's approach, was satisfied.[410]

First, the court found that Dylan purposefully availed itself of the Montana forum because the fallen helicopter "was not brought into Montana by the unilateral act of a disinterested third party . . . . Dylan was very aware of the actions of Haverfield because the decision makers for both companies [were] the exact same."[411] The court determined that "Dylan's attempt to minimize physical contacts with Montana through the use of Haverfield [did] not alter the basic existence of Dylan's involvement in, and its pecuniary benefit from, a full exploitation of the market."[412] As Dylan leased helicopters to Haverfield for use in the continental United States and derived financial benefit from lease payments and insurance proceeds (once the helicopter had crashed) from the helicopter's use in Montana, it purposefully availed itself of the Montana forum.[413]

Second, the wrongful-death action clearly arose from Montana-related activity.[414] And third, the court noted that exercise of jurisdiction was reasonable.[415] In finding reasonableness, the

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406 *Id.*
407 *Id.*
408 *Id.*
409 *Id.* at *3–7.
410 *Id.* at *3 (citing Simmons v. Montana, 670 P.2d 1372, 1378 (Mont. 1983)).
411 *Id.* at *4.
412 *Id.* (citations omitted).
413 *Id.* at *5.
414 *Id.* at *6.
415 *Id.* at *6–7.

court noted Dylan's arguments "that it would be burdensome to defend [the] lawsuit in Montana [as the company was already] defending" lawsuits filed by the two surviving passengers in Pennsylvania.[416] While the court recognized that it was easier to "try a case all at once" with modern travel and communications, "the burden [on Dylan] [was] not so great as to require dismissal."[417]

In *Garcia v. Wells Fargo Bank Northwest NA Trustee*,[418] the Southern District of Florida found that a bank that served as a "passive" trustee owner of an airplane was not subject to personal jurisdiction in a wrongful-death action.[419] The lawsuit arose out of the crash of a Cessna 650 Citation in Venezuela that killed all three occupants on board.[420] Although none of the deceased were citizens of Florida, the personal representative of one of the deceased brought suit there.[421] Defendant Wells Fargo Bank Northwest NA (Wells Fargo) was the registered owner of the Cessna at all relevant times.[422]

In finding against personal jurisdiction, the court determined that Wells Fargo was neither incorporated nor licensed to do business in Florida, nor did it have any physical presence or employees in Florida; it was only a passive trustee owner of the subject airplane, which was purchased and at times maintained in Florida.[423] Because federal law prohibits foreign citizens from registering aircraft in the United States, Wells Fargo operated a trust department that assisted foreign citizens with their registrations.[424] "As part of its trust agreement with foreign nationals," Wells Fargo served as the official owner of the aircraft but "[ceded] all operational control of its airplanes to the lessee for whom the trust [was] established."[425] Wells Fargo did not provide any funds for the purchase of the subject plane, and the plaintiff did not provide any evidence regarding control by Wells Fargo over the plane or evidence that Wells Fargo solicited or advertised its business in Florida.[426] The court found

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416 *Id.* at *6.
417 *Id.*
418 No. 1:10-CV-20383-JLK, 2011 WL 3439530 (S.D. Fla. Aug. 5, 2011).
419 *Id.* at *1.
420 *Id.*
421 *Id.*
422 *Id.* at *2.
423 *Id.* at *6–7.
424 *Id.* at *1.
425 *Id.*
426 *Id.* at *1–2, *6.

that "[t]he undisputed facts demonstrate[d] that if Wells Fargo had any connection with Florida, it was purely tangential and fortuitous."[427]

Therefore, the plaintiff's allegations satisfied neither Florida's long-arm jurisdiction statute nor constitutional notions of due process.[428] The court found that the sale and occasional maintenance of the Cessna in Florida "may [have been] insufficient to confer jurisdiction on the courts of [that] state."[429] However, "[w]hen considered in the context of Wells Fargo's passive ownership of the subject airplane and lack of involvement or solicitation in Florida, such sale and maintenance [was] certainly an insufficient predicate for jurisdiction."[430]

V. THE GENERAL AVIATION REVITALIZATION ACT OF 1994 (GARA)[431]

In *Burton v. Twin Commander Aircraft LLC*,[432] the Washington Supreme Court held that GARA's eighteen-year statute of repose barred a wrongful-death action against Twin Commander because the fraud exception to GARA did not apply: "There [was] no genuine issue of material fact as to whether Twin Commander knowingly withheld information from the FAA that it was required to report."[433]

The action arose from a May 2004 crash in Mexico of a model 690C dual-engine turbo propeller plane, owned at that time by the Mexican government.[434] All seven government agents aboard were killed.[435] The action was filed in Washington state court in 2005 by a personal representative of the decedents' estates.[436] The defendant, Twin Commander, did not actually manufacture the aircraft, but was the current type certificate holder.[437] The Twin Commander series aircraft was originally introduced by Rockwell International in 1971, and the type cer-

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427 *Id.* at *4.

428 *Id.* at *7.

429 *Id.*

430 *Id.*

431 General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (2006) [hereinafter GARA].

432 254 P.3d 778 (Wash. 2011).

433 *Id.* at 780.

434 *Id.* at 781.

435 *Id.*

436 *Id.*

437 *Id.* at 780.

tificate for the series 690C was issued by the FAA in 1979.[438] The aircraft that crashed in 2004 had been manufactured by Gulfstream American Corporation, Rockwell's successor, in 1981.[439] Later, in 1989, the defendant "acquired the 690-series type certificates but did not continue manufacturing the aircraft."[440] As the type certificate holder, the defendant had reporting obligations to the FAA,[441] as well as "the obligation to submit design changes" in accordance with any FAA airworthiness directives and to "prepare instructions for continued airworthiness that met FAA approval."[442]

In 2003, following two crashes of series 690B aircraft, Twin Commander issued a service bulletin advising operators "to inspect the rudder cap for unusual wear, which could result in the rudder cap separating from the aircraft."[443] According to a Mexican government report, the aircraft at issue had been inspected in accordance with the service bulletin.[444] The suit alleged that "service bulletin 235 was a defective product that caused the crash" and that the defendant concealed information from the FAA.[445] In the trial court, Twin Commander successfully moved for summary judgment under GARA, arguing that its status as type certificate holder meant that it was a manufacturer under GARA and therefore entitled to the eighteen-year repose period, and that the service bulletin did not restart that period under GARA's rolling provision for "any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage."[446] The court of appeals reversed, finding that fact questions remained as to whether Twin Commander was a "manufacturer" and whether Twin Commander misled the FAA in reporting the rudder issue.[447]

The Washington Supreme Court took the case and decided that Twin Commander was entitled to summary judgment after

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438 *Id.*

439 *Id.*

440 *Id.*

441 *See id.* at 780–81 (citing 14 C.F.R. §§ 21.3, 21.7 (2009)).

442 *Id.*

443 *Id.* at 781.

444 *Id.*

445 *Id.*

446 *Id.* at 783 (quoting GARA § 2(a)(2)).

447 *Id.* at 781.

all.[448] First, the court stated: "A type certificate holder . . . assumes the obligations of a manufacturer and is entitled to the same protection of the statute of repose. We join the growing majority of courts addressing this issue and hold that a type certificate holder is a 'manufacturer' for purposes of GARA's statute of repose."[449] Second, the court decided that the plaintiff could not take advantage of the fraud exception to GARA's bar.[450] Any misrepresentation, concealment, or withholding of information from the FAA must be knowing:

> [C]onstruing "knowingly" to apply to all of the means by which information may be kept from the FAA best carries out the balance that Congress intended by providing insulation from suit, protecting the [general] aviation aircraft industry, and protecting public safety while affording fair treatment to people injured in aircraft accidents.[451]

The Washington Supreme Court held that the plaintiff "must plead and prove facts that would prove the fraud exception;" it is not the defendant's burden to prove the absence of knowing misrepresentation.[452] One justice dissented, saying that the majority improperly placed this burden on the plaintiff and saying that fact issues remained on the fraud exception.[453] The court then rejected the plaintiff's reliance on two e-mails and an earlier 1992 accident, which the National Transportation Safety Board (NTSB) determined was caused by turbulence, as evidence of such misrepresentation by Twin Commander.[454]

In *Inmon v. Air Tractor, Inc.*, the court affirmed summary judgment in a manufacturer's favor based on GARA's eighteen-year statute of repose (as well as Florida's twelve-year statute of repose for products liability claims).[455] The plaintiff had been dusting crops in an airplane that "was not considered airworthy at the time because the plaintiff had failed to obtain a required annual inspection" when "the right wing of his airplane sud-

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[448] *Id.* at 780.

[449] *Id.* at 784 (citing S. Side Trust & Sav. Bank of Peoria v. Mitsubishi Heavy Indus. Ltd., 927 N.E.2d 179 (Ill. App. Ct. 2010); Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543 (Iowa 2002); Pridgen v. Parker Hannifin Corp., 905 A.2d 422 (Pa. 2006), *adhered to on reargument*, 916 A.2d 619 (Pa. 2007)).

[450] *Id.* at 791.

[451] *Id.* at 786.

[452] *Id.*

[453] *Id.* at 792 (Stephens, J., dissenting).

[454] *Id.* at 787–90.

[455] 74 So. 3d 534, 538–39 (Fla. Dist. Ct. App. 2011).

denly failed."[456] The airplane was manufactured in 1982.[457] In 1993, the manufacturer designed and sold a wing modification kit that was supposed to extend the safe life of the aircraft by means of "a new spar splice with an additional fifth bolt hole further out from the centerline of the aircraft and installing it on the existing lower wing spar cap."[458] The manufacturer issued several service bulletins related to installation of the new spar splice.[459]

The manufacturer moved for summary judgment, arguing "that the spar splice did not cause the accident and therefore the addition of the new part could not restart the applicable statutes of repose."[460] The trial court granted the motion and determined that the various service bulletins did not affect the running of the repose period.[461] In addition, the trial court dismissed the complaint "as a sanction for violating numerous court orders."[462] The plaintiff appealed, and the appellate court affirmed.[463]

The court held that "service bulletins do not constitute a 'new part'" under GARA: "as one court wrote, 'given the continual issuance of service bulletins pertaining to a variety of topics, if the statute of repose [were] triggered every time a service bulletin was issued, the intent of GARA would be eviscerated.'"[464] The plaintiff had also "failed to demonstrate that the new part actually caused the accident."[465]

In *Nowicki v. Cessna Aircraft Co.*, the appellate court affirmed summary judgment in the defendant manufacturer's favor, holding that GARA barred the plaintiff's products liability claims.[466] The action arose from a June 2003 crash in Florida involving a Cessna Model 414 aircraft that was manufactured and delivered to its first owner thirty-three years earlier, in 1970.[467] While the pilot survived, his two passengers were

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456 *Id.* at 536.

457 *Id.*

458 *Id.*

459 *Id.* at 536–37.

460 *Id.* at 537.

461 *Id.*

462 *Id.*

463 *Id.* at 538–39.

464 *Id.* at 538 (quoting Moyer v. Teledyne Cont'l Motors, Inc., 979 A.2d 336, 344 (Pa. Super. Ct. 2009) (internal quotation marks omitted)).

465 *Id.* at 539.

466 69 So. 3d 406, 407 (Fla. Dist. Ct. App. 2011).

467 *Id.*

killed.[468] One of the passengers' estates brought the lawsuit.[469] Notably, the cause of the crash was undisputed: the aircraft ran out of fuel.[470] But the plaintiff's theory of liability was that the "death was caused by a defective rear passenger seat, which detached from the rails and caused Nowicki to violently strike his head inside the airplane on or before impact."[471] Cessna moved for summary judgment, citing GARA's eighteen-year statute of repose as well as Florida's twelve-year statute of repose.[472]

The plaintiff's opposition focused on an airworthiness directive (AD) that had been issued for the aircraft's seat assembly.[473] The directive addressed situations where slippage of the seat assembly, when used by a pilot, had resulted in a loss of control of the aircraft.[474] The plaintiff argued that Cessna had knowingly concealed from the FAA that its Model 414 aircraft contained the same seat assembly, albeit used for a passenger instead of a pilot.[475] But the trial court found this distinction, seized on by the defendant, dispositive, rejecting the plaintiff's argument precisely "because the AD addressed the 'seat slippage' concern only as it presented an unsafe condition in crew seats—not in passenger seats."[476] The plaintiff appealed, and the appellate court affirmed.[477]

The appellate court determined that the trial court erred by placing the burden on the plaintiff to prove that the fraud exception applied.[478] While, under Florida law, the usual order-of-proof principle would require the plaintiff to carry the burden of proving an exception (once the defendant had carried the initial burden of showing the statute applied on its face), the court found significant that the plaintiff had raised its defense to the statute before summary judgment, therefore "Cessna could not establish the claim was time-barred, for summary judgment purposes, until it established the GARA exception was inapplicable."[479] However, the court found this error to be

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468 *Id.*
469 *Id.*
470 *Id.*
471 *Id.*
472 *Id.*
473 *Id.* at 408.
474 *Id.*
475 *Id.* at 408–09.
476 *Id.* at 409.
477 *Id.* at 407.
478 *Id.* at 410.
479 *Id.*

harmless, as the manufacturer still successfully carried the burden of showing that the exception did not apply.[480] While the court's reasoning was not completely clear, it seemed to find persuasive Cessna's argument that, even if there had been concealment, there was no causal relation to the injury; the airworthiness directive was aimed solely at slippage of pilots' seats in order to prevent loss of control of the aircraft, which was not a problem in that case.[481] As a result, the claims were barred.[482]

In *United States Aviation Underwriters, Inc. v. Nabtesco Corp.*, the court granted summary judgment to the defendants, holding that GARA's statute of repose barred a suit alleging a defective landing gear actuator that collapsed on landing.[483] The incident in question happened in August 2009.[484] The actuator in question was originally manufactured in March 1990 and installed on a Cessna aircraft (not the accident aircraft) that was first sold in October 1990 (i.e., more than eighteen years before the incident).[485] Some time later, the actuator was sold to Midwest Jet Corporation, which overhauled the component and, in April 2007, installed it on the aircraft that suffered the gear collapse.[486] That aircraft was sold to its first purchaser in December 1991 (i.e., less than eighteen years before the incident).[487]

The question in the case was to identify the trigger date that started GARA's eighteen-year repose period: the defendants argued that the key date was the sale of the first aircraft in October 1990 (when the actuator was first installed), while the plaintiff contended that the key date was the sale of the accident aircraft in December 1991, or alternatively, April 2007, when the actuator was installed on the accident aircraft.[488] The court noted that GARA has two alternative trigger dates: either "when the manufacturer delivers 'the aircraft' to the first purchaser or lessee" or the "rolling trigger date," when a "new" component replaces a component or is added to the aircraft and allegedly causes the accident.[489]

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480 *Id.*

481 *See id.* at 410–11.

482 *Id.*

483 No. C10-821Z, 2011 WL 1655710, at *1 (W.D. Wash. Apr. 29, 2011).

484 *Id.*

485 *Id.*

486 *Id.*

487 *Id.*

488 *Id.* at *2.

489 *Id.* (citing GARA § 2(a)(1)(2)).

The plaintiff interpreted the GARA provision stating that "no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft."[490] The plaintiff argued that GARA uses the term "the aircraft" as "synonymous with 'general aviation aircraft,'" and hence the accident aircraft sale in December 1991 was the trigger date.[491] The court rejected this argument, holding that "'the aircraft' in GARA § 2(a)(1) is not synonymous with 'general aviation aircraft,' because an aircraft is not a general aviation aircraft until *after* it has been in an accident."[492] "Instead, when the case involves components that have been removed from one aircraft and installed on another, the relevant aircraft for purposes of GARA's first triggering provision is the aircraft in which the components were originally installed."[493] The court also rejected the argument that the overhaul and installation of the actuator in 2007 mattered, holding: "The overhaul of a component does not restart the repose period as to the manufacturer."[494] GARA's rolling provision therefore did not apply, and the relevant date that triggered the repose period was the first sale of the first aircraft bearing the allegedly defective part in October 1990.[495]

Scott v. MD Helicopters, Inc. arose from a crash of a military surplus OH-6A helicopter in May 2007 that killed the person aboard, allegedly the result of a defective main rotor hub.[496] The helicopter had been converted into a Hughes 369A helicopter in 2004 by Lance Aviation.[497] Shortly before the crash, Lance Aviation had been performing maintenance on the aircraft when the main rotor hub failed an inspection.[498] "Lance sent the part to Triumph Gear Systems for overhaul, but ultimately installed a replacement hub out of its inventory. The main rotor retention strap assembly that [was] part of the hub

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490 *Id.* at *1 (quoting GARA § 2(a)).

491 *Id.* at *2.

492 *Id.* at *3 (citing Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1112 (9th Cir. 2002) ("Under GARA, an aircraft cannot fulfill the definition of general aviation aircraft until an accident occurs.")).

493 *Id.*

494 *Id.*

495 *Id.*

496 834 F. Supp. 2d 1334, 1336 (M.D. Fla. 2011).

497 *Id.*

498 *Id.*

failed."[499] "It [was] undisputed that the [strap pack assembly] . . . was not an original military hub because [it] was not sold until 1993."[500] Scott, the plaintiff, sued MD Helicopters, Inc. (MDHI), among others, in strict liability and for negligence primarily on the basis of MDHI's status as type certificate holder for the aircraft and the duties accompanying that status.[501] The plaintiff contended that MDHI should be held liable for inadequate maintenance manuals.[502] MDHI moved for summary judgment.[503]

At the outset, the plaintiff conceded that MDHI was entitled to summary judgment on the strict-liability claims (presumably because MDHI had not designed, manufactured, or sold the products in question, although the opinion does not say).[504] However, the court went on to deny summary judgment on the negligence claim.[505] First, the court decided that there were fact questions regarding MDHI's duty to provide instructions for continued airworthiness—in particular, maintenance manuals.[506] "However, the duty depend[ed], in part, upon factual circumstances—changes to the instructions. It [was] unclear if or when MDHI's instructions changed and, if so, how those changes were distributed."[507] Based on that fact question, the court denied the motion.[508] Second, the plaintiff argued that MDHI's alleged "failure to comply with its regulatory duties constitute[d] negligence per se."[509] But the defendant countered that whoever had been responsible for incorrectly installing the strap pack was not an approved source and performed the work without approved manuals.[510] That improper maintenance therefore constituted an unforeseeable intervening cause.[511] The court determined that fact questions on that issue also required denial of summary judgment.[512]

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499 *Id.*
500 *Id.*
501 *Id.*
502 *Id.*
503 *Id.*
504 *Id.* at 1337.
505 *Id.* at 1338–39.
506 *Id.* at 1338.
507 *Id.*
508 *Id.*
509 *Id.*
510 *Id.* at 1339.
511 *Id.*
512 *Id.*

The court rejected affirmative defenses raised by MDHI.[513] In addition to rejecting defenses based on successor liability, government contractor status, and a Florida general statute of repose, the court notably rejected a GARA statute of repose defense.[514] The court accepted the plaintiff's theory of the case as being based on a defective manual, not on the helicopter itself (first sold around 1968) or the failed strap pack, which MDHI did not manufacture: "Because a maintenance manual is not a part, GARA does not bar claims involving maintenance manual defects."[515] The court also disagreed that this was akin to "a claim for 'failure to warn,' which is barred by GARA."[516]

> The [c]ourt finds, however, that Scott's claim does not neatly fit that category, in part because the claim focuses on FAA regulations. It does not follow that the FAA would require manufacturers to make available changes to maintenance manuals if failure to do so were protected by the statute of repose. The [c]ourt therefore finds that Scott's negligence claim is not barred by GARA.[517]

In *Smith v. Cessna Aircraft Co.*, the court denied summary judgment to Cessna, which had relied on GARA's statute of repose to bar claims against it based on its sale of an allegedly defective part.[518] The action arose from a fatal February 2008 crash of a Cessna Citation III.[519] According to the plaintiff, the monitor in the actuator control unit "failed to detect wear in the no-back brake, which eventually failed, causing the nose of the aircraft to pitch down, resulting in a crash."[520] While the aircraft in question had been delivered by Cessna to its first purchaser more than twenty years before the crash, a new actuator control unit was installed in 2006.[521]

The parties disputed whether Cessna could be held liable as a co-designer of the replacement actuator control unit, but the decision turned instead on the fact that, in 2006, Cessna sold the replacement part to the company that installed the part on

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513 *Id.* at 1339–41.

514 *Id.* at 1339–40.

515 *Id.* at 1340.

516 *Id.* (citation omitted).

517 *Id.*

518 No. 6:10-cv-274-Orl-31KRS, 2011 WL 5178331, at *1 (M.D. Fla. Sept. 21, 2011).

519 *Id.*

520 *Id.*

521 *Id.*

the aircraft.[522] Cessna relied on the House of Representatives Judiciary Committee notes on GARA stating:

> For example, in the event a party who happened to be a manufacturer committed some negligent act as a mechanic of an aircraft or as a pilot, and such act was a proximate cause of an accident, the victims would not be barred from bringing a civil suit for damages against that party in its capacity as a mechanic.[523]

Although this passage seems, if anything, to limit GARA's reach, Cessna contended that GARA "should still shield manufacturers when they are sued in an incidental role that created no additional risk."[524] The court rejected this interpretation, holding that GARA shields only manufacturers in their capacity as such and, according to Cessna's own version of the facts, it was not a manufacturer.[525] Therefore GARA did not apply.[526] Hence,

> the quoted text does not at all suggest that Congress intended to shield manufacturers facing liability for doing something other than manufacturing the aircraft or part at issue. It suggests the opposite—i.e., that GARA *only* protects manufacturers when they are sued in that role . . . . Here, Cessna is being sued in its capacity as seller of the new part, and therefore GARA does not bar this suit.[527]

In *Crouch v. Teledyne Continental Motors, Inc.*, the court denied the defendant's motion for summary judgment.[528] In November 2006, Larry Crouch was piloting his Piper single-engine aircraft over Kentucky with a single passenger, Teddy Lee Hudson, when the engine lost power and made a hard crash landing, injuring the two men.[529] The aircraft's engine was manufactured by Lycoming in 1977 and installed in the accident aircraft in 1978, which was also the year of the aircraft's delivery to its first purchaser.[530] In 2005, the engine was overhauled by John Jewell Aircraft, Inc., and the original magneto replaced.[531] The re-

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522 *Id.* at *2.

523 *Id.* (quoting H.R. REP. No. 103–5625, pt. 2, at 6 (1994)).

524 *Id.*

525 *Id.*

526 *Id.*

527 *Id.*

528 833 F. Supp. 2d 1331, 1338 (S.D. Ala. 2011).

529 *Id.* at 1332.

530 *Id.* at 1333.

531 *Id.*

placement magneto was factory-rebuilt by TCM in 2005; at that time, the magneto was put in new housing that included metal tabs, or flanges, that secured the magneto to the engine.[532] "The magneto housing was new, including the two flanges, and was manufactured in 2005 by TCM. The magneto was attached to the engine using the original Lycoming clamps, washers, and nuts."[533] In addition, the magneto gasket was manufactured by Superior.[534] Among other ideas, the plaintiffs advanced a theory that the loss of engine power was caused by the magneto's flanges breaking as a result of fatigue fractures.[535]

TCM moved for summary judgment under GARA's statute of repose.[536] The court denied the motion.[537] TCM's first argument was that the flange design predated the crash by more than eighteen years and had not been substantially altered in the meantime.[538] Hence, GARA should have barred the claims for a design defect.[539] While the court accepted that the design had not changed, it focused on the fact that the flange installed in the aircraft was a new part, regardless of when it had been designed:

> [T]he plain language of GARA provides no such protection. The "rolling" provision clearly provides that the period for bringing a cause of action restarts each time a "new" part replaces an old part and the "new" part, i.e. the flange, is alleged to be the problem. The "rolling" provision does not require that the part be newly designed, rather it only requires it to be a new part.[540]

TCM argued next that, indisputably, the magneto and its flanges did not cause the loss of power, based on air traffic control transcripts in which the pilot reported that he had had an engine fire, not failure, ground witnesses who reported hearing engine noise while the aircraft was in the air, and expert witness testimony that the flanges broke on impact.[541] However, the court determined that it should not weigh evidence or make a

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532 *Id.*

533 *Id.* at 1333–34.

534 *Id.* at 1338.

535 *Id.* at 1333.

536 *Id.* at 1332.

537 *Id.* at 1338.

538 *Id.* at 1335–36.

539 *Id.*

540 *Id.* at 1336.

541 *Id.* at 1336–37.

credibility determination at that point and so declined to rule.[542]

Third and finally, TCM argued that it could not be held liable for a failure to warn of issues with respect to Superior's gasket or Lycoming's attachment hardware for securing the magneto to Lycoming's engine.[543] The court held: "However, [the] [p]laintiffs' 'failure to warn' claim [was] based on its allegations that TCM had knowledge but failed to warn that the magneto housing flanges may develop fatigue fractures which could result in the flanges cracking and the magneto disengaging from the engine."[544]

Later at trial, TCM won a complete defense verdict.[545] The plaintiffs have appealed the verdict to the Eleventh Circuit, where the appeal is pending as case number 11-13811.[546]

A companion case to the Alabama *Crouch* case has been pending in Kentucky federal court (the action was originally filed in Kentucky federal court; TCM was dismissed from that action for lack of personal jurisdiction, and the plaintiffs brought a new suit against TCM in Alabama).[547] The defendants in Kentucky included Avco Corporation, Lycoming's successor.[548] In *Crouch v. Honeywell International, Inc.*, the court denied the plaintiffs' motion for reconsideration of a grant of summary judgment for Avco Corporation.[549] In a 2010 decision, the court had determined that an engine maintenance manual qualified for protection under GARA's statute of repose, since it "[was] an essential element in the overall process of creating a product that satisfies FAA regulations" and that therefore Avco was acting in its capacity as a manufacturer when it published the manual.[550]

The plaintiffs argued that the manual was not a "part" and therefore that GARA could not protect Avco for alleged flaws in the manual.[551] The court rejected this argument, since "their

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[542] *Id.* at 1337.

[543] *Id.* at 1337–38.

[544] *Id.* at 1338.

[545] Brief of Defendant-Appellee at 4, Crouch v. Teledyne Cont'l Motors, Inc., No. 11-13811 (11th Cir. June 4, 2012).

[546] *Id.* at 2.

[547] *See* Crouch v. Honeywell Int'l, Inc., No. 3:07-CV-638-S, 2011 WL 3627283, at *1 (W.D. Ky. Aug. 17, 2011).

[548] *Id.*

[549] *Id.* at *4.

[550] Crouch v. Honeywell Int'l, Inc., No. 3:07-CV-638-S, 2010 WL 4449222, at *2 (W.D. Ky. Nov. 1, 2010).

[551] *Crouch*, 2011 WL 3627283, at *3.

entire claim vis a vis the manual rest[ed] on their claim that the manual, and subsequent service bulletins, failed to provide any warning that the magneto assembly in Crouch's plane might come loose. This is precisely the sort of action that GARA forbids."[552] The court also rejected the plaintiffs' attempts to amend their complaint based on supposedly newly discovered evidence showing knowing concealment by Avco with respect to the FAA, in particular, Lycoming service bulletins dating from 2002, 2003, and 2007 "that identif[ied] problems with the magneto assembly in some types of Lycoming engines."[553] Noting that the plaintiffs had been in possession of these bulletins for almost a year and yet said nothing until losing summary judgment, the court stated that it "[would] not excuse their attempt to pass off evidence that had been in their possession for months as 'newly discovered'" and denied the requests.[554]

The plaintiffs have sought to appeal the various orders letting Avco out of the case, but the Sixth Circuit has noted that such orders are nonfinal since claims remain against other defendants.[555] The court of appeals ordered the plaintiffs to show cause why the appeal should not be dismissed for lack of jurisdiction, but has not ruled on the issue.[556]

VI. EVIDENCE AND EXPERTS

In *Competitor Liaison Bureau, Inc. v. Cessna Aircraft Co.*,[557] a case in the Middle District of Florida, the defendant, the Cessna Aircraft Company, put forth an expert in aviation accident investigation and reconstruction, Tommy McFall, to testify that the cause of the airplane crash in the case was poor aircraft maintenance, a malfunctioning radar unit, and pilot error in response to an emergency.[558] The plaintiffs challenged the expert on the grounds that he had no expertise in metallurgical engineering, fire cause and origin, toxicology, or aircraft maintenance, and that experience in those areas was necessary to offer an opinion

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552 *Id.*

553 *Id.* at *2.

554 *Id.*

555 *See* Crouch v. Honeywell Int'l, Inc., No. 3:07-CV-638-S, 2012 WL 2521327, at *2 (W.D. Ky. June 28, 2012).

556 *Id.*

557 No. 6:08-cv-2165-Orl-28GJK, 2011 WL 1152127 (M.D. Fla. Mar. 9, 2011) (Mag. J. Rep. & Rec.), *adopted*, 2011 WL 1325603 (M.D. Fla. Mar. 28, 2011).

558 *Id.* at *1.

on the cause of the crash in that case.[559] The plaintiffs also objected on the grounds that Mr. McFall lacked sufficient facts to support his conclusions.[560]

On the issue of metallurgy, Mr. McFall relied on a report by an acknowledged expert in that field in order to establish an opinion that a fire onboard the aircraft was caused by an electrical fault associated with the weather radar.[561] On the issue of toxicology, Mr. McFall's opinions were based heavily on the lack of soot in the pilot's larynx and thyroid, which Mr. McFall interpreted as evidence that no fire was in the cabin.[562] On the maintenance issue, Mr. McFall relied upon his knowledge and experience as a pilot and accident reconstruction expert to offer testimony that the owners of the plane at issue failed to properly respond to mechanical issues that the aircraft was experiencing well before the crash.[563]

The magistrate judge ultimately ruled against all of the plaintiffs' objections and allowed Mr. McFall to testify.[564] The judge found that the facts and evidence provided by the expert in metallurgy were of the type reasonably relied upon by experts in aircraft accident reconstruction, and thus it was permissible for Mr. McFall to rely upon this evidence in making his own expert determination on crash causation.[565] The judge also found that Mr. McFall's testimony regarding toxicology and maintenance were within the scope of his expertise as an aviation accident reconstruction expert.[566] The court found that it was reasonable for Mr. McFall to testify as to the lack of smoke in the pilot's larynx.[567] The court also found that it was within Mr. McFall's expertise as an experienced pilot to testify that the aircraft had not been properly maintained.[568] The judge further found that Mr. McFall had sufficient facts to testify, as there was circumstantial evidence to support his opinions, and circumstantial evidence is typically relied upon in aviation reconstruction cases.[569]

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559 *Id.* at *5.
560 *Id.* at *5–7.
561 *Id.* at *5.
562 *Id.*
563 *Id.* at *6–7.
564 *Id.* at *8.
565 *Id.* at *5.
566 *Id.*
567 *Id.*
568 *Id.* at *6.
569 *Id.* at *8.

Damian v. Bell Helicopter Textron, Inc.[570] decided, among other things, that an expert in bird-impact transparency design, who had extensive expertise in designing transparencies for airplanes, but only limited experience working with large helicopters and none with small helicopters, was not qualified to testify regarding an alternative design for a bird-impact resistant windshield on a small helicopter.[571]

The plaintiffs' expert, Billy Hinds, testified that the acrylic used in the windshield of a Bell 407 helicopter was defectively designed because it was not bird-impact resistant, and that the technology existed for such a windshield at the time of the helicopter's design.[572] The court found that Mr. Hinds had no experience with helicopters of that size, no way of knowing if attaching a bird-proof windshield was feasible for such a craft, had done no testing of his alternative design, and had never used that design in a non-judicial setting.[573] Mr. Hinds's only response was that "there probably wouldn't have had to be much change to the structure" with no basis for that opinion and a general opinion that all types of aircraft are essentially the same and employ the same basic principles of flight.[574]

The court found that, since Mr. Hinds had no expertise in helicopter design and had cited no study or article to support his proposed new design, there was no justifiable method of determining whether his design was safer than the design used or if his design was even feasible.[575] Thus his testimony could not meet the standards of *Daubert*.[576] Mr. Hinds's argument that his experience with airplanes was sufficient to apply to helicopters because the basic principles for any aircraft are "basically the same" was rejected, with the court finding that it is important for the purposes of providing an alternative design that the expert have the knowledge and expertise to determine if the alternative design is actually feasible and safer than the original design.[577] In addition, the court found that Mr. Hinds had

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570 352 S.W.3d 124 (Tex. App.—Fort Worth 2011, pet. denied).

571 *Id.* at 132.

572 *Id.*

573 *Id.* at 149–51.

574 *Id.* at 147.

575 *Id.* at 152.

576 *Id.* at 151; *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

577 *Damian*, 352 S.W.3d at 150.

never used a design similar to the one he was offering in testimony in his own work outside the judicial context.[578]

VII. CHOICE OF LAW

In *Pestel v. Gulfstream Aerospace Corp.*,[579] a pilot sought damages against Gulfstream Aerospace Corporation for injuries suffered after falling from a retractable ladder installed in the aircraft while parked briefly on the tarmac at the Narita International Airport in Japan.[580] The plaintiff "ultimately lost his pilot's license because he was unable to pass the required medical examinations based on his injuries."[581]

In determining which jurisdiction's law applied, Judge James Zagel employed Illinois's choice-of-law test—the "most significant relationship"—as discussed in the Second Restatement of Conflicts of Laws.[582] Judge Zagel found that, although the situs of the injury was Japan, this "fortuitous" location was not of significant importance; rather, Illinois's decided interest in protecting its citizens from potentially harmful products, coupled with the parties' likely expectations that Illinois law would govern, proved superior.[583] These expectations were deemed valid, "considering that the plaintiff and the defendant only came together because of the fact that McDonald's Corporation's Illinois headquarters purchased the aircraft, brought it to Illinois, and had the plaintiff (himself an Illinois citizen) fly it to and from the state of Illinois."[584]

In *Powers v. Lycoming Engines*,[585] the plaintiffs in a putative class action sought damages for engines they claimed "were manufactured with defective crankshafts" capable of causing a "total loss of engine power and in-flight engine failures."[586] The plaintiffs alleged that "Lycoming knew of and concealed the defect that prevented the crankshafts from functioning as intended."[587]

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578 *Id.* at 150–51.

579 No. 09 CV 6113, 2011 WL 3157294 (N.D. Ill. July 26, 2011).

580 *Id.* at *1.

581 *Id.*

582 *Id.*

583 *Id.* at *2.

584 *Id.* at *3.

585 272 F.R.D. 414 (E.D. Pa. 2011).

586 *Id.* at 417.

587 *Id.*

Of the fifty jurisdictions represented, "thirty-one states, including Pennsylvania, and the District of Columbia, [did] not require privity of contract to recover for breach of the implied warranty of merchantability where only economic damages are involved."[588] The remaining eighteen jurisdictions required privity between the parties.[589]

The plaintiffs argued that Pennsylvania law should apply to their breach-of-implied-warranty claim because—even if there was a true conflict with other states—"Pennsylvania [had] significant contacts with the contract for the sale of the aircraft and [had] a materially greater interest in having its law applied."[590] Lycoming, located in Williamsport, Pennsylvania, contended that Pennsylvania law should not be applied because "Pennsylvania [did] not have significant contacts with the contract for the sale of each aircraft."[591]

The district court used Pennsylvania's two-step process to resolve the choice-of-law question.[592] The court first determined whether the competing states' governmental interests would be frustrated by application of the other states' laws.[593] The court referred to the Second Restatement of Conflict of Laws and weighed the following five factors to determine which state's laws would have the most significant relationship with the transaction and the parties: "(1) where the contract was made; (2) where it was negotiated; (3) where it was performed; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties."[594]

"Weighing the above contacts on a qualitative scale, [the court] conclude[d] that each putative class member's state of purchase had the most significant relationship with each contract."[595] The court held (1) that members of the class had a

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588 *Id.* at 420.

589 *Id.*

590 *Id.* at 417.

591 *Id.*

592 *Id.* at 419.

593 *Id.* at 420–21. That is, would allowing plaintiffs to sue a manufacturer with whom they did not deal directly frustrate the interests of those states that require privity for breach of implied warranties? Or conversely, would insulating Lycoming from suit frustrate Pennsylvania's interest in holding responsible a manufacturer that has placed a defective product in the stream of commerce?

594 *Id.* at 421–22 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)).

595 *Id.* at 423.

"due process right to have their claims decided by application of their own state's laws"; (2) that Pennsylvania did not have the requisite aggregation of significant contacts that would "ensure the application of its law[s] [would] not be 'arbitrary or unfair'"; and (3) that "applying Pennsylvania law to each class member's implied warranty of merchantability claim would violate both the Due Process and the Full Faith and Credit Clause[s]."[596]

The plaintiffs' motion for class certification was initially granted by the District Court.[597] Lycoming appealed the class certification order, and the Third Circuit vacated the order certifying the class and remanded the case requesting a new analysis.[598]

VIII. MONTREAL[599] AND WARSAW[600] CONVENTIONS

In *Aina v. United Parcel Service, Inc.*,[601] the plaintiff asserted claims for libel and for breach of contract for the delayed shipment of computer equipment and baby-care products when his packages were ultimately delivered to his Nigerian place of business with the words "Nigerian Fraud Intercept" printed across them.[602] The defendant moved for summary judgment, arguing that the plaintiff's claims were preempted by the Warsaw Convention as amended by the Hague Protocol, since both the United States and Nigeria are signatories to the treaty.[603]

In granting summary judgment, the court found that the plaintiff's state-law claims for breach of contract and libel were preempted by the Warsaw Convention, which had created causes of action for loss, damage, or delay to packages and was the exclusive remedy against international carriers for participating countries.[604]

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596 *Id.* at 424.

597 Powers v. Lycoming Engines, Inc., 328 F. App'x 121, 122 (3d Cir. 2009).

598 *Id.* at 128.

599 Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. 106-45, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

600 Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter Warsaw Convention].

601 No. H-10-3655, 2011 WL 4458761 (S.D. Tex. Sept. 22, 2011).

602 *Id.* at *1.

603 *Id.* at *3.

604 *Id.*; *see also* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October

In *AXA Art Insurance Corp. v. Art Courier*,[605] the plaintiff brought an action against the defendants "seeking recovery for a Brice Marden painting entitled Au Centre (1969) . . . that was damaged in Frankfurt, Germany, while in transit from Moscow to New York via Lufthansa Airlines."[606] The painting, valued at $2.8 million, suffered damage to all four corners, could not be restored, and suffered a total loss.[607]

"It [was] undisputed that Lufthansa accepted the painting in good condition and delivered it in damaged condition."[608] When an item is damaged in international transit, the carrier is presumed liable pursuant to the Warsaw Convention, and the only dispute there was "whether the Warsaw Convention limited Lufthansa's liability."[609] Under the convention, the carrier must provide a waybill that contains:

> a notice to the consignor to the effect that, if the carriage involves an ultimate destination of stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the [c]onvention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo.[610]

Since Lufthansa failed to submit evidence that demonstrated proper notice, Judge Jed Rakoff granted the plaintiff's motion for summary judgment against Lufthansa in the amount of $2.8 million.[611]

In *Cardoza v. Spirit Airlines, Inc.*,[612] the "[p]laintiff . . . , as personal representative of the estate of Gertrudis Cardoza-Sori, filed a one-count complaint for absolute liability under Article 17 of the Montreal Convention" after Ms. Cardoza-Sori collapsed and died while on board Spirit Airlines (Spirit) Flight 716 from Santo Domingo, Dominican Republic to Fort Lauder-

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1929, arts. I, XVIII, XIX, XXIV, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. [hereinafter Hague Protocol]. The Fifth Circuit found that the Warsaw Convention provided the exclusive remedy of international air carriers by providing an independent cause of action, thereby preempting state law. Boehringer–Mannheim Diagnostics Inc. v. Pan Am. World Airways Inc., 737 F.2d 456, 458 (5th Cir. 1984).

605 No. 09 Civ. 7362(JSR), 2011 WL 2749885 (S.D.N.Y. July 6, 2011).

606 *Id.* at *1.

607 *Id.* at *2.

608 *Id.* at *3.

609 *Id.*

610 *Id.* (quoting Hague Protocol, *supra* note 604, arts. VI–VIII).

611 *Id.*

612 No. 10-61668-Civ., 2011 WL 2447523 (S.D. Fla. June 15, 2011).

dale, Florida.[613] Spirit moved for summary judgment, and the plaintiff moved for partial summary judgment.[614]

"Article 17 of the Montreal Convention . . . imposes liability on an aircraft carrier when an 'accident' causes a passenger's death or bodily injury [during] an international flight."[615] "A flight crew's inaction may constitute an 'accident.'"[616]

> The [p]laintiff identifie[d] three "accidents," which caused Ms. Cardoza-Sori's death: (i) Spirit did not make an announcement to see if there was a physician aboard the plane; (ii) Spirit did not attempt to use its onboard [Automated External Defibrillator (AED)] to revive Ms. Cardoza-Sori; and (iii) Spirit and its pilots did not divert to a "closer" airport, but continued to the intended destination.[617]

Evidence was provided that refuted the first "accident" as claimed by plaintiff.[618] The court found that, because of conflicting evidence regarding the remaining two "accidents" ("whether Spirit flight attendants' failure to use the AED was 'unexpected or unusual' and whether the pilots' decision to continue on to Fort Lauderdale instead of landing in Nassau or Miami was 'unexpected or unusual'"), summary judgment was not proper.[619] In denying both motions, the court determined that whether or not an "accident" within the meaning of Article 17 caused Ms. Cardoza-Sori's death "involve[d] disputed questions of material fact for the jury."[620]

In *Chubb Insurance Co. of Europe v. Menlo Worldwide Forwarding, Inc.*,[621] the facts were as follows:

> On November 14, 2004, Air New Zealand Engineering, Ltd. contracted with Menlo Worldwide Forwarding, Inc. (Menlo) to ship a turbine aircraft engine from New Zealand to the United States.

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613 *Id.* at *1–2.

614 *Id.* at *2.

615 *Id.* at *3. An accident is "an unexpected or unusual event or happening that is external to the passenger" and not "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." Air Fr. v. Saks, 470 U.S. 392, 405–06 (1985).

616 *Cardoza*, 2011 WL 2447523, at *3; *see also* Olympic Airways v. Husain, 540 U.S. 644, 656 (2003).

617 *Cardoza*, 2011 WL 2447523, at *4.

618 *Id.* After discovery, both parties agreed that when Ms. Cardoza-Sori became ill, Spirit flight attendants made a call over the public address (PA) system requesting medical assistance.

619 *Id.* at *5.

620 *Id.*

621 634 F.3d 1023 (9th Cir. 2011).

> Menlo, in turn, contracted with Qantas Airways, Ltd. (Qantas) to perform the actual carriage of the engine to its destination. When the engine arrived in Los Angeles on or about November 19, however, it was not in the same condition as when it had left New Zealand; it had been damaged sometime during transportation. The engine's owner subsequently filed a claim with its insurer, Chubb Insurance Co. of Europe, S.A. (Chubb), for the resulting loss. Chubb paid the owner $119,666.62.[622]

Chubb then recovered $80,000 from Menlo's successor-in-interest, UPS Supply Chain Solutions, Inc. (UPS), after which UPS filed a third-party complaint against Qantas seeking indemnification and contribution for sums UPS paid to Chubb.[623] The district court dismissed UPS's third-party complaint, reasoning that the claims against Qantas were untimely since they were not brought within two years as required under Article 35 of the Montreal Convention.[624] The Ninth Circuit held that "the 'right to damages' referenced in Article 35 [was] the cause of action under the Montreal Convention by which a passenger or consignor may hold a carrier liable for damage sustained to passengers, baggage, or cargo."[625] However, UPS did not seek compensation for damage sustained to the engine, but rather *indemnification* (and *contribution*) from Qantas for sums paid to Chubb.[626]

Despite UPS lacking a "right of damages" under Article 35, the Ninth Circuit found that UPS was entitled to a "right of recourse" against Qantas as provided in Article 37.[627] Therefore, "because [the] action between carriers for indemnification or contribution [was] premised on the 'right of recourse,' rather than the 'right to damages,' Article 35's time bar [did] not apply," and the timing of UPS's action should have been governed

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622 *Id.* at 1025.

623 *Id.*

624 *Id.* at 1025–26. Article 35 of the Montreal Convention states: "The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped." *See* Montreal Convention, *supra* note 599, art. 35.

625 *Chubb*, 634 F.3d at 1026.

626 *Id.*

627 *Id.* at 1027. Article 37, entitled "Right of recourse against third parties," provides: "Nothing in this [c]onvention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." Montreal Convention, *supra* note 599, art. 37.

by local law.[628] Additionally, the Ninth Circuit noted that Article 35 only mandated that "the right to damages shall be extinguished if *an action* is not brought within a period of two years," but "[did] not require that '*all actions*' relating to a particular event must be brought within two years."[629] Furthermore, the Ninth Circuit, in reversing the district court, was not persuaded to follow pre-Montreal Convention precedent interpreting Article 29 of the Warsaw Convention.[630]

In *Dorton v. Hendrick Motorsports, Inc.*,[631] the plaintiff, as personal representative of the estate of Randall Alexander Dorton, filed a motion for a new trial on the grounds that the verdict was "'against the great weight of the evidence,' [was] based on false evidence, and would [have] result[ed] in a miscarriage of justice."[632] The "case involve[ed] claims arising out of the crash of a Beechcraft Super King Air 200 turboprop aircraft on October 24, 2004 as it attempted to land at the Martinsville, Virginia, airport."[633] The plaintiff implicated the Warsaw Convention by relying on two cases in her argument that the "pilot's failure to continuously monitor [the] aircraft's navigational instruments during [Instrument Flight Rules (IFR)] conditions constituted willful, wanton, and reckless negligence."[634]

The first case, *Koirala*, "was a bench trial applying the 'willful misconduct' standard under the Warsaw Convention to the conduct of pilots of a Thai Airways flight that crashed into the mountains near Kathmandu, Nepal, in 1992."[635] "Willful misconduct" under the Warsaw Convention, as applied in *Koirala*, meant that a carrier or agent must have acted either "(1) with

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628 *Id.* The Ninth Circuit found that Article 45 supports this, stating "[Article 45] provides that 'an action for damages may be brought . . . against [the actual] carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, *the procedure and effects being governed by the law of the court seized of the case.*' " *Id.*

629 *Id.*

630 *Id.* at 1028. Article 35 of the Montreal Convention is largely identical to Article 29 of the Warsaw Convention. *Compare* Montreal Convention, *supra* note 599, art. 35, *with* Warsaw Convention, *supra* note 600, art. 29.

631 Dorton v. Hendrick Motorsports, Inc., 792 F. Supp. 2d 870 (M.D.N.C. 2011).

632 *Id.* at 873.

633 *Id.*

634 *Id.* at 878.

635 *Id.* (citing Koirala v. Thai Airways Int'l., Nos. C-94-2644SC, C-95-0082SC, 1996 WL 40243, at *1 (N.D. Cal. Jan. 26, 1996), *aff'd*, 126 F.3d 1205, 1207 (9th Cir. 1997)).

knowledge that its action would probably result in injury or death, or (2) in conscious or reckless disregard of the fact that death or injury would be the probable consequences of its action."[636] The court distinguished *Koirala* by the fact that, there, the pilots failed to scan any of their instruments for over five minutes, totally oblivious to the fact that they were headed straight into a mountain, and the trial court's finding of willful misconduct on those facts was affirmed on the deferential standard of not being "clearly erroneous."[637]

The second case, *In re Korean Air Lines Disaster of September 1, 1983*, resulted in a verdict finding that the deaths of those on board Korean Air Lines Flight 007, which was shot down by Soviet military aircraft after straying 360 miles off course, was proximately caused by the "wilful misconduct" of the flight crew.[638] The court distinguished *In re Korean Air Lines* by the facts that "the pilots failed to monitor their navigational equipment for over five hours, and the aircraft had strayed nearly 360 miles off course into Soviet airspace."[639]

In finding for the defendant, the court found that, unlike the pilots in *Koirala* and *In re Korean Air Lines*, there was evidence that the pilots of the Beechcraft had "monitored at least some (perhaps many) of their navigational instruments during their attempt to land at [Martinsville]."[640] "Moreover, while both cases upheld a finding of liability, neither *Koirala* nor *In re Korean Air Lines* held that a contrary finding would have been against the clear weight of the evidence."[641] The court denied the plaintiff's motion for a new trial.[642]

In *Goodwin v. British Airways PLC*,[643] the plaintiff sought damages under the Montreal Convention after sustaining a fractured ankle when another passenger bumped into her as she was exiting the aircraft, causing her to fall.[644] "In seeking summary

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636 *Id.* at 879 n.9 (quoting *Koirala*, 1996 WL 40243, at *5).

637 *Id.*

638 *Id.* (citing *In re* Korean Air Lines Disaster of Sept. 1, 1983, 156 F.R.D. 18, 19 (D.D.C. 1994)). The court in *In re Korean Air Lines* likewise used the Warsaw Convention's standard of "wilful misconduct." *In re Korean Air Lines*, 156 F.R.D. at 19.

639 *Id.*

640 *Id.*

641 *Id.*

642 *Id.* at 886.

643 Goodwin v. British Airways PLC, No. 09-10463, 2011 WL 3475420 (D. Mass. Aug. 8, 2011).

644 *Id.* at *1.

judgment, [the defendant] argue[d] that the event that caused the plaintiff's fall was not an 'accident' within the meaning of Article 17."[645]

In Massachusetts, where *Goodwin* was tried, courts use a two-step analysis to determine whether an incident is an "accident" within the meaning of Article 17.[646] The evidence must demonstrate "that (1) an unusual or unexpected event that was external [to the plaintiff] occurred, and (2) this event was a malfunction or abnormality in the aircraft's operation."[647] The court found that "where, as [there], an injury results from a physical collision with another passenger," beyond mere jostling, the event is "'quintessentially external' and satisfies the first prong of the 'accident' analysis."[648] However, the court found that the plaintiff failed to satisfy the second prong, citing a lack of evidence that would require the flight crew's assistance during disembarkation.[649] The incident, therefore, was not within the purview or control of the airline since "'a flight crew is in no better position to detect and avoid the dangers inherent in walking' than its passengers."[650]

In *Heinemann v. United Continental Airlines*,[651] the plaintiff brought suit against the defendant based on an incident that occurred at the conclusion of a flight from Amsterdam to Seattle, resulting in the plaintiff's arrest as he disembarked.[652] The defendant moved for summary judgment on the grounds that, inter alia, the plaintiff's claims were preempted by the Montreal Convention.[653]

The court found that the flight on which the incident occurred met the Article 2 definition of "international carriage."[654] The fact that the plaintiff's flight had a stopover in Chicago and

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645 *Id.*

646 *Id.* at *4.

647 *Id.*; *see also* Gotz v. Delta Air Lines, Inc., 12 F. Supp. 2d 199, 201–02 (D. Mass. 1998); Air Fr. v. Saks, 470 U.S. 392, 405 (1985).

648 *Goodwin*, 2011 WL 3475420, at *4–5; *see also* Garcia Ramos v. Transmeridian Airlines, Inc., 385 F. Supp. 2d 137, 141 (D.P.R. 2005).

649 *Goodwin*, 2011 WL 3475420, at *6.

650 *Id.* (quoting *Garcia Ramos*, 385 F. Supp. 2d at 143).

651 No. 2:11-CV-00002-MJP, 2011 WL 2144603 (W.D. Wash. May 31, 2011).

652 *Id.* at *1.

653 *Id.* at *2.

654 *Id.* at *3. "[A]ny carriage in which . . . the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated . . . within the territories of two [s]tates [p]arties . . . ." Montreal Convention, *supra* note 599, art. 2.

that the incident occurred at the conclusion of the Chicago-Seattle leg of the flight did not alter the "international carriage" nature of the flight.[655] The court abided by the Ninth Circuit's prior holdings that the "Warsaw Convention (the predecessor agreement to the Montreal Convention) preempt[ed] any independent state-law claims arising out of an incident occurring during 'international carriage.'"[656]

The court then determined whether the plaintiff was entitled to relief under the provisions of the Montreal Convention for any "accident" without a showing of "bodily injury."[657] The court's "review of [the] [p]laintiff's complaint (as well as every pleading he had filed since initiating the complaint) reveal[ed] no allegations of bodily injury arising out of any behavior he allege[d] on the part of [the] [d]efendant's employees."[658] In granting summary judgment, the court found that the plaintiff was not entitled to recover under the terms of the Montreal Convention for any psychological or emotional damage he may have sustained.[659]

In *Lavergne v. Atis Corp.*,[660] families of individuals who died in a plane crash, which departed the Dominican Republic bound for San Juan, Puerto Rico, brought actions against the air carrier, Atis, under the Montreal Convention, seeking to recover damages for the individuals' wrongful deaths and for their own pain and suffering.[661] The air carrier and its insurer moved to dismiss for lack of subject matter jurisdiction.[662] Article 1(1) of the Montreal Convention provides: "This convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport *undertaking*."[663]

The defendants, in their motion to dismiss, argued that the "Montreal Convention, like its predecessor, only applie[d] to commercial international flights."[664] "They contended that the

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655 *Heinemann*, 2011 WL 2144603, at *3.

656 *Id.*; *see also* Carey v. United Airlines, 255 F.3d 1044, 1054 (9th Cir. 2001); El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 176 (1999).

657 *Heinemann*, 2011 WL 2144603, at *4.

658 *Id.*

659 *Id.* at *4–5.

660 767 F. Supp. 2d 301 (D.P.R. 2011).

661 *Id.* at 303.

662 *Id.* at 302.

663 *Id.* at 305 (quoting Montreal Convention, *supra* note 599, art. 1(1)).

664 *Id.*

wording variations between Article 1(1) of the Montreal Convention and Article 1.1 of the Warsaw Convention [were] due to French–English translation differences that did not substantively affect their scope."[665] Specifically, they argued, that "the concepts of air transport 'undertaking' and 'enterprise' both referred to air transport businesses, not private flights carried out for friends."[666]

The "[p]laintiffs argue[d] that the [d]efendants' motions to dismiss [were] 'premised on the incorrect proposition that the terms of the Montreal Convention are the same as those of the treaty which it substituted, the Warsaw Convention.' "[667] According to the plaintiffs, the purposes of the Montreal and Warsaw Conventions vary widely.[668] "Specifically, they point[ed] out that the Warsaw Convention sought to 'limit the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry,' whereas the Montreal Convention [sought] to ensure the protection of passengers and consumers in international carriage by air."[669] The "[p]laintiffs further contend[ed] that a comparison of Article [1(1)] of the Montreal Convention, and Article [1.1] of the Warsaw Convention show[ed] that the latter is limited to commercial airlines, while the former may encompass private flights. . . ."[670]

The court found that there was "no substantial change in the meaning of the provisions after their translation to English insofar as both refer[red] to gratuitous carriage performed by a company or legally constituted body in the air transport business."[671] As such, the court determined that the "case law interpreting the Warsaw provision [was] binding precedent when analyzing Article 1(1) of the Montreal Convention."[672]

The court determined that the plane was not used for commercial purposes, that the "deceased passengers did not pay a fare to be transported by Atis," and that "Atis operated the plane under Part 91 of the Federal Aviation Regulations, which governs flight operations conducted for personal use."[673] The court

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665 *Id.*

666 *Id.*

667 *Id.*

668 *Id.*

669 *Id.* at 305–06.

670 *Id.* at 306.

671 *Id.* at 308.

672 *Id.*

673 *Id.* at 308–09.

ultimately found that Atis did not operate as an air transport undertaking as contemplated by Article 1(1) of the Montreal Convention and therefore dismissed the plaintiffs' claims under the Montreal Convention and granted the defendants' motion to dismiss.[674]

In *Phifer v. Icelandair*,[675] the plaintiff, Phifer, sought to recover damages under Article 17 of the Montreal Convention for injuries she sustained after striking her head against a television monitor on the defendant's plane.[676] "After entering her assigned row . . . , [the plaintiff] placed two carry-on bags under the seat in front of hers, stood up, and struck her head on an overhead television monitor, which was extended in the down position."[677] The defendant won summary judgment when the district court required the plaintiff to provide evidence that the airline had failed to meet FAA requirements.[678]

Judge Bybee declared that Icelandair would only be liable to Phifer if her injury was *caused* by an accident—in that case, the television monitors being down during boarding.[679] Accordingly, liability would attach if the "television monitor's being in a down position during boarding (1) was an unexpected or unusual event or happening that (2) was external to Phifer and (3) caused her injuries."[680] The Ninth Circuit found that the district court erred in granting summary judgment to Icelandair on the grounds that the plaintiff failed to provide evidence that the defendant's conduct was in violation of FAA requirements.[681] According to Judge Bybee, "[w]e have never held that a violation of FAA requirements is a prerequisite to suit under Article 17."[682]

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674 *Id.* at 309–10.

675 652 F.3d 1222 (9th Cir. 2011), *as amended on denial of reh'g* (Sept. 1, 2011).

676 *Id.* at 1223.

677 *Id.*

678 *Id.*

679 *Id.* at 1224 (citing Air Fr. v. Saks, 470 U.S. 392, 398–99 (1985) (requiring courts to focus their attention on the "accident *which caused* the passenger's injury, and not to [the] accident which *is* the passenger's injury . . . impl[ying] that, however we define 'accident,' it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone.")).

680 *Id.*

681 *Id.*

682 *Id.*; *see also* Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002) (finding Article 17 liability without any evidence the airline failed to meet FAA requirements), *aff'd*, 540 U.S. 644 (2004); Prescod v. AMR, Inc., 383 F.3d 861, 868 (9th Cir. 2004) (per curiam) (also finding Article 17 liability without any evidence the airline failed to meet FAA requirements).

In *Ramos v. American Airlines, Inc.*,[683] the "plaintiff allege[d] that she sustained injuries . . . while in the process of boarding an international flight from Charlotte Douglas International Airport to Santo Domingo, Dominican Republic."[684] The plaintiff alleged that, while rendering wheelchair assistance to board her flight, the defendants, Charlotte Skycap Service, Inc. and one of its employees, "caused and/or allowed [her] to lose her balance and fall. . . ."[685]

"In support of the [defendants'] motion for summary judgment, [the] defendants contend[ed] that th[e] action [was] governed by the Montreal Convention and [was], thus, time-barred under the [c]onvention's two-year statute of limitations."[686] The "[p]laintiff contend[ed] . . . that the Montreal Convention [did] not apply."[687] Article 17 of the Montreal Convention states that a "carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."[688] "[W]here it applies, the Montreal Convention is the exclusive means for recovery of damages suffered in the course of international air travel and preempts all state law claims."[689]

"The only disputed issue on . . . [the] motion for summary judgment [was] whether the plaintiff was in the process of 'embarking' the plane when she was injured."[690] The court considered the following factors: "(1) the activity of the passenger at the time of the accident; (2) the restrictions, if any, on the passengers' movement; (3) the imminence of actual boarding; and (4) the physical proximity of the passengers to the gate."[691]

The court determined that the plaintiff was in the process of "embarking" as she had been "checked in under all the guidelines and protocols of an international passenger and was issued a boarding pass for her final destination. . . ."[692] The court also

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683 No. 3:11cv207, 2011 WL 5075674 (W.D.N.C. Oct. 25, 2011).

684 *Id.* at *1.

685 *Id.*

686 *Id.* at *2.

687 *Id.*

688 Montreal Convention, *supra* note 599, art. 17(1).

689 *Ramos*, 2011 WL 5075674, at *2; *see also* El Al Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999).

690 *Ramos*, 2011 WL 5075674, at *2.

691 *Id.*

692 *Id.* at *3.

made note of the plaintiff's repeated allegations in her amended complaint that she had suffered injuries while "boarding" her flight.[693]

In *Rogers v. Continental Airlines, Inc.*,[694] the plaintiff asserted state-law claims for tort and breach of contract "based on her removal by defendant Continental Airlines, Inc. from a flight bound from Newark to Cancun, Mexico."[695] "Continental removed th[e] case to federal court and . . . move[d] for summary judgment," asserting that the plaintiff's claims were preempted by the Montreal Convention and that the plaintiff "fail[ed] to state a viable . . . [claim] under the convention."[696]

Under Article 17 of the Montreal Convention, "airline liability for passenger injury in international travel attaches only when 'a passenger suffers: (1) bodily injury in (2) an accident that occurred while (3) on board, embarking, or disembarking.'"[697] The court found that the "relevant timeframe for analyzing the [plaintiff's injuries was] the period when she was on the plane and in the jetway," which the court considered as "disembarking" in that the plaintiff was "actually physically exiting the plane."[698] Summarily, the court found that the plaintiff's actions brought her within the purview of the Montreal Convention, thereby preempting her state-law claims.[699] The court also found that the plaintiff was barred from recovery under the Montreal Convention "because, inter alia, she did not sustain any bodily injury within the meaning of Article 17."[700]

In *Rubin v. Air China Ltd.*,[701] the plaintiff filed a claim under the "Passenger Compensation Rights for International Flights" provision of the Montreal Convention against the defendant, alleging the following damages due to a thirteen and one-half-hour delay on Air China Flight 985 from Beijing, China to San Francisco, California:

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693 *Id.*

694 No. 10-3064(KSH), 2011 WL 4407441 (D.N.J. Sept. 21, 2011).

695 *Id.* at *1.

696 *Id.* at *1–3.

697 *Id.* at *4 (citing Schaefer-Condulmari v. U.S. Airways Grp., Inc., No. 09-1146, 2009 WL 4729882, at *4 (E.D. Pa. Dec. 8, 2009); Terrafranca v. Virgin Atl. Airways Ltd., 151 F.3d 108, 110 (3d Cir. 1998) (citing E. Airlines, Inc. v. Floyd, 499 U.S. 530, 535–36 (1991))).

698 *Rogers*, 2011 WL 4407441, at *5.

699 *Id.*

700 *Id.* at *6.

701 No. 5:10-CV-05110-LHK, 2011 WL 2463271 (N.D. Cal. June 21, 2011).

> (1) pain and suffering; (2) lost work; (3) physical illness with attendant medical treatment costs; (4) "being trapped in a freezing Beijing airport that was worse than a prisoner would be treated"; (5) the cost of [the] [p]laintiff's round-trip ticket from San Francisco to Beijing; and (6) the cost of a late-night taxi from the San Francisco airport.[702]

The parties agreed that Article 19 of the Montreal Convention governed the plaintiff's claims.[703] The defendant filed a motion for judgment on the pleadings, seeking to limit the plaintiff's recovery to out-of-pocket expenses incurred as a result of the delay.[704]

Under Article 19, a "carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo."[705] However, the court granted the defendant's motion in part.[706] The court found that the plaintiff could not recover on his claim for pain and suffering as Article 19 excludes damages for "purely emotional injuries" caused by delay.[707] The court, how-

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[702] *Id.* at *1–2. This case was originally filed in the Small Claims Division of the Santa Clara County Superior Court on September 30, 2010. Defendant Air China removed the case to federal court under 28 U.S.C. § 1441(d), which permits foreign sovereigns to remove any civil action to federal court under 28 U.S.C. § 1441(a)–(b). The plaintiff filed a motion to remand the case back to state court on the grounds that (1) Air China failed to give timely notice of the removal and file a copy of the notice with the clerk of the state court and (2) even if Air China properly removed under Section 1441(d) as a foreign sovereign, the court should remand the claims against domestic defendant United Airlines. In a prior decision denying the plaintiff's motion, the court found (1) that Air China's eight-day delay in notifying the parties and the state court did not constitute a procedural defect warranting remand and (2) that the Ninth Circuit has held that a foreign entity can remove an entire action, not simply the claims against it, and that claims arising under the Montreal Convention fall within the grant of federal question jurisdiction pursuant to 28 U.S.C. § 1331. Rubin v. Air China, Ltd., No. 10-CV-05110-LHK, 2011 WL 1002099, at *2 (N.D. Cal. Mar. 21, 2011).

[703] *Rubin*, 2011 WL 2463271, at *2.

[704] *Id.* at *1.

[705] *Id.* at *2. A carrier can avoid liability "for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." *Id.*

[706] *Id.* at *5.

[707] *Id.* at *2; *see also* Daniel v. Virgin Atl. Airways Ltd., 59 F. Supp. 2d 986, 992 (N.D. Cal. 1998); Elnajjar v. Nw. Airlines, Inc., Nos. H-04-680, H-04-681, 2005 WL 1949545, at *4 n.5 (S.D. Tex. Aug. 15, 2005) ("Because [the] [p]laintiffs [did] not allege that they suffered any economic loss or physical injury . . . they [could not] meet the conditions for recovery under Article 19"); Ikekpeazu v. Air Fr., No. 3:04 CV 00711(RNC), 2004 WL 2810063, at *1–2 (D. Conn. Dec. 6, 2004) ("dismissing [the] plaintiff's claims for emotional injury under Article 19").

ever, allowed the plaintiff to pursue recovery on his claims for lost work, physical illness and medical expenses, and the cost of his taxi home from the San Francisco airport, as these were considered financial injuries suffered by the plaintiff as the result of Air China's delay.[708]

In *Sewer v. Liat (1974) Ltd.*,[709] the plaintiff asserted claims of discrimination, defamation, and intentional or negligent infliction of emotional distress when he was prevented from flying his ticketed route from Tortola, British Virgin Islands to Antigua.[710] The defendant moved for summary judgment, arguing that the plaintiff's claims should fail because they arose "from his attempted travel on an airplane operated by a foreign airline in a foreign country."[711]

"'[R]ecovery for . . . personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking' in a foreign territory is governed exclusively by the Montreal Convention and its predecessor, the Warsaw Convention."[712] Thus, "to be compensable under the [Montreal and] Warsaw Convention[s], [the plaintiff] must have suffered . . . physical injury" that was "proximately caused by an accident" occurring while "on board [the] aircraft or in the course of any of the operations of embarking or disembarking."[713] In granting summary judgment, the court relied on the fact that the plaintiff failed to submit any evidence of discrimination and freely admitted that no Liat employee or agent caused him any injury.[714]

In *Souza v. American Airlines, Inc.*,[715] a pro se plaintiff sought damages for lost baggage and negligent infliction of emotional

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[708] *Rubin*, 2011 WL 2463271, at *3–5. Note that the court granted the defendant's motion for judgment on the pleadings as to the plaintiff's claim for his time spent "trapped" in the Beijing Airport, although the court granted the plaintiff leave to amend this claim to include an economic component as "damages for inconvenience do not fall within the rubric of 'emotional distress.'" *Id.* at *4 (quoting *Daniel*, 59 F. Supp. 2d at 994).

[709] No. 04-76, 2011 WL 635292 (D.V.I. Feb. 16, 2011).

[710] *Id.* at *1. The plaintiff was eventually escorted from the flight and handcuffed by an off-duty police officer after becoming unruly. *Id.*

[711] *Id.*

[712] *Id.* at *2; *see also* El Al Isr. Airlines v. Tseng, 525 U.S. 155, 161 (1999) (citing Warsaw Convention, *supra* note 600); Acevedo-Reinoso v. Iberia Lineas Aereas de Espana S.A., 449 F.3d 7, 11 (1st Cir. 2006).

[713] *Sewer*, 2011 WL 635292, at *3 (citing Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 70 n.2 (1st Cir. 2000) (citation omitted)).

[714] *Id.* at *3–4.

[715] No. 10 Civ. 5938(DAB)(KNF), 2011 WL 2749086 (S.D.N.Y. July 7, 2011).

distress after American Airlines lost baggage checked by the plaintiff on a flight from New York to Rio de Janeiro, Brazil.[716] American Airlines sought a "determination that its liability . . . [would] not, as a matter of law, exceed the limits set forth in the [Montreal] Convention . . . , currently set at 1,131 Special Drawing Rights (SDRs)," which is equivalent to roughly $1,741.[717]

Because the United States and Brazil were both signatories to the Montreal Convention, the plaintiff's state-law claim of negligent infliction of emotional distress was preempted by the terms of the Montreal Convention, leaving the plaintiff's claim for lost baggage for disposition by the court.[718]

Article 17 of the Montreal Convention states that "a carrier is liable for damage sustained in case of destruction or loss of . . . checked baggage upon condition only that the event which caused the destruction, loss or damage took place . . . during any period within which the checked baggage was in the charge of the carrier."[719] However, liability of the carrier is limited to 1,131 SDRs unless the "passenger[ ] made, at the time" of checking her baggage, "a special declaration of interest in delivery at destination."[720] Since the plaintiff failed to submit evidence of a declaration of interest while checking her baggage, Magistrate Judge Kevin Fox limited her recovery to the statutory 1,131 SDRs.[721]

In *Walsh v. Koninklijke Luchtvaart Maatschappij N.V.*,[722] the plaintiff sought damages under the Montreal Convention for injuries he sustained to his elbow after tripping over a low-lying metal bar in the Schiphol Airport in Amsterdam.[723] The defen-

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716 *Id.* at *1.

717 *Id.*

718 *Id.* at *2–3 ("analyzing language in the Warsaw Convention, [n]early identical to that in the Montreal [C]onvention, and concluding there is no 'recovery for purely mental injuries'"); *see also* El Al Isr. Airlines v. Tseng, 525 U.S. 155, 175 (1999); Ginsberg v. Am. Airlines, No. 09 Civ. 3226(LTS)(KNF), 2010 WL 3958843, at *3 (S.D.N.Y. Sept. 27, 2010); E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991).

719 *Souza*, 2011 WL 2749086, at *3.

720 *Id.* (quoting Montreal Convention, *supra* note 599, art. 22). Pursuant to Article 24, the 1,000 SDR limit was raised to 1,131 SDRs on December 30, 2009. *Id.*

721 The plaintiff failed to object to Judge Fox's report and recommendation within fourteen days as provided in his report. The recommendation was ultimately adopted by the district judge. Souza v. Am. Airlines, Inc., No. 10 Civ. 5938(DAB)(KNP), 2011 WL 3251575, at *1 (S.D.N.Y. July 18, 2011).

722 No. 09-civ-01803(RKE), 2011 WL 4344158 (S.D.N.Y. Sept. 12, 2011).

723 *Id.* at *1.

dant moved for summary judgment arguing that it "did not exert control over the [plaintiff] and, therefore, he could not have been embarking" within the meaning of Article 17.[724]

"The Montreal Convention creates strict liability for an air carrier when bodily injury occurs in the course of 'any operations of embarking' as a result of an 'accident.'"[725] Although courts have employed a three-part test to determine whether an injury took place while "embarking," the court in *Walsh* chose to focus mainly on the control exercised by the airline over the individual.[726]

In denying summary judgment, the court found that a reasonable jury could find that the defendant was exercising control over the plaintiff as he (1) was "seated at the departure gate when two boarding calls were made," (2) "stood up in order to join a group of passengers assembled near the gate after [hearing the] boarding calls," and (3) took steps toward surrendering his boarding pass.[727] Although the plaintiff's injury took place forty-five minutes prior to his flight, this was not fatal to his "embarking" claim considering the international nature of the flight.[728]

As for the defendant's argument that the low-lying metal bar was an expected object and the plaintiff therefore was not injured as the result of an "accident," the court found that the trier of fact could conclude that the bar was an unexpected object, as it had protruded past the seating area and was of a color similar to that of the floor.[729]

In *Tewes v. Gulf Air*,[730] the plaintiffs sought damages for breach of contract when they were forced to fly coach on an alternate flight from Bahrain to Dubai after Gulf Air cancelled

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[724] *Id.* at *1–2.

[725] *Id.* at *1 (citing Montreal Convention, *supra* note 599, art. 17).

[726] *Id.* at *2 (The three-part test examines "(1) the control the airline had over the passenger; (2) the activities of the passenger; and (3) the location of the passenger." Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975)).

[727] *Id.* at *3.

[728] *Id.* Recall *Ramos*, where the court found that the plaintiff was in the process of "embarking" as she had been "checked in under all the guidelines and protocols of an international passenger and was issued a boarding pass for her final destination." Ramos v. Am. Airlines, Inc., No. 3:11-cv-207, 2011 WL 5075674, at *3.

[729] *Walsh*, 2011 WL 4344158, at *4–5.

[730] Tewes v. Gulf Air, No. H-10-1685, 2011 WL 649532 (S.D. Tex. Feb. 10, 2011).

their original flight for which they had business class seats.[731] The "[p]laintiffs allege[d] that, in return for their agreement to accept coach class tickets, Gulf Air's supervisor told them they could use their business class tickets at a later date."[732] "When [the] plaintiffs attempted to use the tickets, Gulf Air refused."[733]

Gulf Air removed the action from state court after arguing that the plaintiffs' claims were "premised upon international carriage, and [were], in effect, claims arising from a delay that must [have been] brought pursuant to the Montreal Convention."[734]

The plaintiffs moved for reconsideration of the court's order denying remand, urging, inter alia, "that their claim [was] for non-performance of a contract of carriage and [was], therefore, not covered under the Montreal Convention. . . ."[735] In fact, the "plaintiffs had no complaint until more than a month after the flight was completed when Gulf Air refused to honor its alleged agreement to permit the plaintiffs to reuse their business class tickets."[736]

In granting the plaintiffs' motion for reconsideration, the court found that the plaintiffs' claim fell outside the provisions of the Montreal Convention, which therefore did not preempt the plaintiffs' state-law claim for breach of contract.[737] The court reasoned that the plaintiffs did not assert that they had suffered damages arising from a delay in international transportation; rather, the plaintiffs claimed damages arising from a "complete refusal by Gulf Air to transport [them] more than a month removed from [Gulf Air's] cancelled flight. . . ."[738]

IX. ADMINISTRATIVE LAW

In *City of Santa Monica v. FAA*,[739] the City of Santa Monica enacted an ordinance banning Category C and D aircraft (generally, business and executive jets with approach speeds of 121 knots or greater at maximum landing weight) from using the

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731 *Id.* at *1.

732 *Id.*

733 *Id.*

734 *Id.*

735 *Id.*

736 *Id.* at *2.

737 *Id.* at *3.

738 *Id.*

739 631 F.3d 550 (D.C. Cir. 2011).

Santa Monica municipal airport except in emergencies.[740] The airport had a single runway and "serve[d] general aviation . . . and as a reliever airport for Los Angeles International Airport."[741] In the 1980s, the city sought to close the airport entirely; however, after litigation, the city and the FAA reached an agreement by which the airport remained open.[742] Later grants of federal money to the city incorporated the terms of this agreement and required Santa Monica to make the airport available for use on "fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses."[743] Later grants of federal money to the city incorporated this promise in the grant agreements.[744]

After Santa Monica passed the ordinance in March 2008, the city and the FAA proceeded through an administrative review process, which resulted in the FAA's determination that the "[o]rdinance was invalid for two reasons: because Congress's grant of exclusive authority to the FAA to regulate aviation safety preempt[ed] the [o]rdinance and because the [o]rdinance violate[d] [the city's] contractual obligations under" the grant agreements.[745] Santa Monica filed a petition for review of the FAA's action in the D.C. Circuit.[746]

After reviewing the evidence in the record, the court of appeals upheld the FAA's decision and denied the petition: "[A]pplying the Administrative Procedure Act's highly deferential standard of review, we conclude that the FAA did not act arbitrarily or capriciously when it concluded that 'the discriminatory restriction against operators of Categories C and D aircraft [was] unjust and not necessary for the safe operation of [the airport].'"[747] Since the agency's action could be upheld on these grounds, the court of appeals declined to consider the constitutional question of preemption.[748]

Barnes v. U.S. Department of Transportation (DOT)[749] arose from a petition challenging an FAA order clearing the way for construction of a new runway at Hillsboro Airport (HIO), twelve

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740 *Id.* at 552.
741 *Id.* at 551.
742 *Id.* at 551–52.
743 *Id.* at 552.
744 *Id.*
745 *Id.* at 553.
746 *Id.* at 551.
747 *Id.* at 559 (citations omitted).
748 *Id.*
749 655 F.3d 1124 (9th Cir. 2011).

miles west of downtown Portland, Oregon.[750] The order (known as a "finding of no significant impact") exempted the Port of Portland, which was building the runway, from having to prepare an environmental impact statement (EIS).[751] The petitioners alleged that the FAA failed to consider the environmental impact of increased traffic following the construction and that the petitioners, local residents, were not given a proper public hearing as required by 49 U.S.C. § 47106(c)(1)(A)(i).[752] The court of appeals granted the petition and remanded.[753]

The court found that the record demonstrated that "the [Port of Portland and the FAA] had independent knowledge of a reasonable possibility that increasing capacity at HIO would lead to increased demand, but chose to gloss over it."[754] The possibility of increased demand and of the accompanying impact on the environment meant that the FAA erred by not requiring an EIS.[755] However, the court found that the two-hour "open house" format used by the FAA for a public hearing was sufficient, since the meeting was "under the direction of a designated hearing officer for the purpose of allowing the members of the public to 'speak and hear' about the project."[756]

Judge Sandra Segal Ikuta dissented, finding that the petitioners had waived their argument about increased demand, and that, in any event, deference was owed to the FAA's determination.[757] She deemed the ruling counter-productive from an environmental standpoint as well:

> It is conventional wisdom among aviators that "when the weight of the paper equals the weight of the airplane, only then you can go flying." The majority confirms the truth of this quotation: here a federal agency is trying to reduce airport delays and the concomitant negative environmental effects by commencing a project in anticipation of future growth, and the majority sides with delay and air pollution by imposing pointless paperwork on the agency before the necessary project can go forward.[758]

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750 *Id.* at 1126.

751 *Id.* at 1129–30.

752 *Id.* at 1130–31.

753 *Id.* at 1143.

754 *Id.* at 1134.

755 *Id.* at 1136–39.

756 *Id.* at 1142.

757 *Id.* at 1145–47 (Ikuta, J., dissenting).

758 *Id.* at 1143.

In *Town of Barnstable v. FAA*,[759] a case arising out of the development of the nation's first offshore wind farm, petitioners, the town of Barnstable, Massachusetts and a non-profit organization challenged the FAA's determination that the proposed wind turbines would not pose a hazard to aircraft.[760] The FAA defended its determination and challenged the petitioners' standing.[761] The Court of Appeals for the D.C. Circuit found that the petitioners had standing and that the "FAA . . . misread its regulations, leaving the challenged determinations inadequately justified."[762] The court also determined that the FAA's determination influenced the Department of the Interior's decision to lease the project area to the proposed wind farm's developer.[763]

The court of appeals began by examining the petitioners' standing, applying the familiar three-part test of injury, causation, and redressability.[764] While the FAA acknowledged the adequacy of the petitioners' injury claims, it argued that there was no causation because (1) the FAA's decision had no enforceable legal effect and (2) there was no redressability as it was the Department of the Interior that was the ultimate decision-maker regarding the lease of the project area to the developer.[765] The court rejected these arguments, finding that the Department of the Interior frequently relied upon the decisions of the FAA, took FAA hazard decisions "very, very seriously,"[766] and incorporated FAA hazard determinations into its own formal decision-making process.[767] Thus, the petitioners could properly argue that the FAA determination was a cause of the Department of Interior's decision and that a different determination by the FAA could have redressed the harm.[768]

After finding that the petitioners had standing to challenge the decision, the court agreed with the petitioners that the FAA's decision was "arbitrary and capricious" because it failed to comport with the agency's own internal guidelines.[769] The guidelines required the FAA to consider whether a structure

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759 659 F.3d 28 (D.C. Cir. 2011).
760 *Id.* at 30–31.
761 *Id.* at 31.
762 *Id.*
763 *Id.* at 31–32.
764 *Id.* at 31.
765 *Id.* at 31–32.
766 *Id.* at 32.
767 *Id.* at 33–34.
768 *Id.*
769 *Id.* at 34.

would have an adverse effect on Visual Flight Rules (VFR) operations in a variety of ways, including if it had an effect on the operation of air navigation facilities due to "physical or electromagnetic radiation."[770] The FAA, however, in its published decision, referred only to a single portion of the handbook, which stated that structures of under 500 feet were not VFR hazardous and failed to address the other ways in which a structure can interfere with VFR.[771] As the wind turbines in that case were below 500 feet, the FAA concluded that the turbines were not hazardous and did not undergo further analysis.[772]

The FAA claimed that its guidebook contained "criteria rather than rules to follow."[773] The court of appeals agreed; however, it found that the FAA had applied a single section of the handbook in a mechanical fashion, ignored other parts of the handbook, and ultimately failed to acknowledge ways in which the turbines could be hazardous.[774] The court ruled that the FAA was required to publish a ruling that dealt with the additional issues raised in the case and that did not simply rely on a single portion of the handbook.[775]

In *Cooper v. NTSB*,[776] a pilot submitted a false statement in his application for a medical certificate from the FAA by stating that he had not been convicted of any charges involving driving while intoxicated, when in fact, he had been charged with felony driving under the influence, and his driver's license had been suspended for six months.[777] The FAA issued an emergency revocation of his pilot's license for making fraudulent and intentionally false statements on his application for a medical certificate, and the NTSB upheld the emergency revocation.[778]

The pilot, Mr. Cooper, testified that he had filled out the paperwork provided to him by his doctor without reading it and had failed to realize that it was asking whether he had a felony conviction for driving under the influence.[779] The FAA used a "willful disregard" standard, holding that Mr. Cooper's failure to read the questions before answering them amounted to a form

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770 *Id.* at 35.
771 *Id.*
772 *Id.*
773 *Id.* at 36.
774 *Id.*
775 *Id.*
776 660 F.3d 476 (D.C. Cir. 2011).
777 *Id.* at 479.
778 *Id.* at 480–81.
779 *Id.* at 480.

of willful blindness sufficient to find that he had engaged in an intentional falsification of his application for a medical application.[780] The court agreed that this standard was appropriate, and that, by failing to read the questions posed to him, Mr. Cooper opened himself up to a charge of intentional falsification.[781] Thus, the decision to grant an emergency revocation of his pilot's license was upheld.[782]

In *Manin v. NTSB*,[783] another pilot, Mr. Manin, faced an emergency revocation of his pilot's license for intentional falsification of his medical certification application provided to the FAA. Mr. Manin had been charged with multiple disorderly conduct citations, which he had failed to disclose.[784] The decision to remove his pilot's license was upheld by the NTSB.[785] The court of appeals vacated and remanded.[786]

The court reached its decision for two reasons. First, Mr. Manin argued that the revocation of his license was barred under the doctrine of laches since over twelve years had passed since his first conviction.[787] The FAA argued, contrary to prior FAA case law, that the doctrine of laches can only apply in FAA administrative appeals under the "stale complaint" doctrine.[788] In fact, FAA precedent established that laches was an accepted doctrine in similar cases, and the court of appeals ordered the FAA to consider this doctrine when making its decision.[789]

The second issue was that Mr. Manin argued that he filled out his paperwork improperly because he lacked understanding of the applicable reporting requirements of the form.[790] He believed that his disorderly conduct citations were summary offenses and did not need to be reported.[791] While the FAA and the NTSB rejected this argument, the court of appeals found that, when deciding on intentional falsification, the subjective state of mind of the defendant was an issue in that case.[792] For

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780 *Id.* at 483.
781 *Id.* at 485–86.
782 *Id.* at 486.
783 627 F.3d 1239 (D.C. Cir. 2011).
784 *Id.* at 1240–41.
785 *Id.* at 1240.
786 *Id.*
787 *Id.* at 1241–42.
788 *Id.* at 1242.
789 *Id.*
790 *Id.* at 1243–44.
791 *Id.*
792 *Id.* at 1244.

these reasons, the court of appeals vacated the NTSB's decision and sent the case back for further proceedings.[793]

X. OTHER SUBJECT AREAS

A. INSURANCE

Trishan Air, Inc. v. Federal Insurance Co.[794] affirmed a district court's decision that an insurer properly denied coverage for a claim because the insured aircraft owner had failed to comply with a policy provision requiring co-pilots to have specified training.[795] The aircraft in question was a corporate jet that, on takeoff from Santa Barbara airport in 2007, ran off the runway and was substantially damaged.[796] The aircraft's owner filed a claim for the damage with Federal Insurance Co. (Federal).[797] The insurance policy had a pilot warranty endorsement that required all pilots of the covered aircraft to "have successfully completed a ground and flight recurrent/initial training course for the make and model operated within the past [eighteen] months. Any such course must [have] incorporate[d] the use of a motion-based simulator specifically designed for the insured make and model/make and model series."[798] The policy excluded coverage for noncompliance with this provision.[799] After the insurer denied coverage based on this noncompliance, the insured brought an action.[800] The district court entered summary judgment in the insurer's favor, and the insured appealed.[801]

The Ninth Circuit affirmed.[802] The evidence showed that the co-pilot (who was not in command of the aircraft) had not undertaken the required motion-based simulator training, although he had thousands of hours of flight time and had undertaken static cockpit training and other kinds of training.[803] The parties had stipulated that it did not matter whether or not

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793 *Id.* at 1245.

794 635 F.3d 422 (9th Cir. 2011).

795 *Id.* at 424.

796 Trishan Air, Inc. v. Fed. Ins. Co., No. CV-07-06204-RGK(FMOx), 2008 WL 5549453, at *2 (C.D. Cal. Dec. 22, 2008).

797 *Trishan Air, Inc.*, 635 F.3d at 424.

798 *Id.* at 425.

799 *Id.*

800 *Id.* at 426.

801 *Id.*

802 *Id.* at 424.

803 *Id.* at 425–26.

the breach of the pilot warranty caused the accident.[804] The court of appeals determined that the pilot warranty was not a "mere condition of the . . . policy, . . . requiring . . . substantial compliance," but rather "an element of the fundamental risk insured."[805] Therefore, "strict compliance with pilot warranties serves as a necessary corollary of aviation insurance policies," and the "failure to comply with any aspect of the required training for co-pilots completely undermined [the insurer's] ability to negotiate and implement the terms of its policies."[806] Because the insured "failed to comply with any aspect of the warranty's required training for co-pilots," Federal was entitled to deny coverage for the claim.[807]

B. SEPTEMBER 11 LITIGATION

In re September 11 Property Damage Litigation[808] affirmed the district court's approval of a settlement of cases brought by various parties against the airlines, security companies, and aviation industry defendants based on property damage suffered in the September 11, 2001 World Trade Center attacks.[809] The appeal, which was brought by non-settling plaintiffs, World Trade Center Properties LLC and other affiliated entities, largely turned on the interpretation of the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA)[810] that was passed in the wake of the attacks.

The appellants challenged the district court's application of the "first come, first served" rule under New York law, which generally allows insurers to settle as they see fit.[811] They argued that this state rule was preempted by ATSSSA's creation of a "limited fund," and that they were entitled to an equitable share.[812] The court of appeals found this argument unsupported by the statutory text and held that there was no preemption in that instance.[813] The court next affirmed the district court's finding that the "settling parties [had] entered into their

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804 *Id.* at 427 n.6.

805 *Id.* at 428 (internal quotation marks omitted).

806 *Id.* at 428–30.

807 *Id.* at 435.

808 650 F.3d 145 (2d Cir. 2011).

809 *Id.* at 155.

810 Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)).

811 *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d at 151.

812 *Id.*

813 *Id.* at 151–53.

settlement agreement in good faith."[814] Finally, the court rejected the argument that the settlement amounts should not have been credited to the settling defendants' respective liability limits under ATSSSA:[815] "[There], reading the term in context, it [was] clear that 'liability' refers to a 'financial or pecuniary obligation' that can arise through the settlement of claims."[816]

C. Federal Tort Claims Act

In *LeGrand v. United States*,[817] the plaintiff-flight attendant sought damages against the United States under the Federal Tort Claims Act,[818] alleging that the FAA's air traffic controllers "negligently failed to warn" the pilot of Southwest Airlines Flight 2745 "that severe turbulence was forecast."[819] In passing, the court found that under 28 U.S.C. § 1346(b)(1) (governing personal injury or wrongful-death actions against the United States), the law of Ohio applied because the injury and the FAA's alleged negligent conduct took place there.[820]

D. Tarmac Delay Rule

A November 14, 2011 consent order[821] between the DOT and American Eagle Airlines, Inc. resulted in the first fine assessed under the tarmac delay rule, which took effect in April 2011 and generally does "not permit an aircraft to remain on the tarmac for more than three hours" with certain safety and air traffic control-related exceptions.[822] The fine totaled $900,000 and resulted from delays at O'Hare (ORD) airport on May 29, 2011, the day before Memorial Day.[823] Bad weather at the airport caused departure delays, which then had a knock-on effect, delaying the ability of arriving flights to reach the terminal and deplane.[824] The DOT blamed "American Eagle's overly optimistic estimation of its ability to handle the number of flights it chose to operate into ORD and its poor planning of its crew and

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814 *Id.* at 153–54.

815 *Id.* at 154–55.

816 *Id.* at 155.

817 774 F. Supp. 2d 910 (N.D. Ill. 2011).

818 *Id.* at 912 (citing Federal Tort Claims Act, 28 U.S.C. § 2674 (2006)).

819 *Id.*

820 *Id.* at 918–19.

821 Dep't of Transp., Consent Order No. OST-2011-0003 (2011), *available at* http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0003-0061.

822 *Id.* at 1–2 (citing 14 C.F.R. § 259.4(b)(1) (2011)).

823 *Id.*

824 *Id.* at 3.

gate resources" for causing "608 passengers to remain on aircraft in excess of three hours without the opportunity to deplane."[825] According to the consent order, American Eagle also paid $150,000 in compensation to the affected passengers.[826]

Effective August 23, 2011, international flights at U.S. airports are now generally prohibited from remaining on the tarmac for more than four hours without deplaning, subject to the same exceptions as the domestic rule.[827]

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[825] *Id.* at 4.
[826] *Id.* at 5.
[827] 14 C.F.R. § 259.4(b)(2) (2011).

Comments


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